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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, MYRON A. MAIEWSKI,
JOHN F. APITZ, BILLY R. BURKE,
WILLIAM F. BURNETTE, BRIAN D. BURNS,
LARRY E. DAHL, and J. FRED KING,
Petitioners,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Does the rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), preclude an independent Federal adjudicative tribunal from treating an action of another agency it is reviewing as having been taken under a different legal authority than the one the agency invoked?

2. May an administrative tribunal disregard its prior precedent exercising jurisdiction over a class of cases, without any explanation why it is doing so?

3. May such a tribunal, after a full trial, deny a party any relief and disavow its exercise of jurisdiction precisely because the tribunal rules that his claim is entirely meritorious?

PARTIES TO THE PROCEEDINGS

Petitioners are Stewart G. Huber, Myron A. Maiewski, John F. Apitz, Billy R. Burke, William F. Burnette, Brian D. Burns, Larry E. Dahl, and J. Fred King. Each was a Petitioner for Review in the Court of Appeals for the Federal Circuit.

Respondent is the United States Merit Systems Protection Board, also Respondent in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Stewart G. Huber, Myron A. Maiewski, John F. Apitz, Billy R. Burke, William F. Burnette, Brian D. Burns, Larry E. Dahl, and J. Fred King petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-9a) and its Judgment (App. 48a) were entered on June 5, 1986. The Opinion is reported at 793 F.2d 284.

The Opinion and Order of the Merit Systems Protection Board which the Court of Appeals affirmed was entered on January 31, 1985 (App. 10a-20a). It is unofficially reported at 28 M.S.P.R. 17, *sub nom. Blalock, et al.* v. *Department of Agriculture.* The Initial Decision of the Chief Administrative Law Judge of the Board was entered on January 12, 1983 (App. 21a-47a). It is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Federal Circuit were entered on June 5, 1986.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(3).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title 5, United States Code, and of 5 Code of Federal Regulations, are set forth in the Appendix, at pp. 49a-53a.

STATEMENT OF THE CASE

Under regulations issued by the Office of Personnel Management all civilian employees of the Executive Branch have the right to appeal to the Merit Systems Protection Board from reduction-in-force actions. 5 C.F.R. §§ 351.202(a), 351.901 (App. 51a-53a). Civilian employees who are not veterans, and who are in the Excepted Service, do not have a right by statute or regulation to appeal an "adverse action," such as a removal or suspension of more than 14 days. 5 U.S.C. § 7511(a). The crux of this case is that the United States Court of Appeals for the Federal Circuit has held that the Merit Systems Protection Board may deprive such employees of their right to appeal their separation in an action taken by an agency as a reduction-in-force, by treating that action as instead constituting a *de facto* adverse action (App. 5a-8a).

Petitioners, who were non-veteran Excepted Service employees of the Department of Agriculture, appealed to the Board from their separations in May 1981, which occurred in an action taken by that Department as a reduction-in-force (App. 54a-58a), and defended as such by it before the Board. Also appealing the same action were 24 veterans who had been separated at the same time (App. 22a, 46a).

After a lengthy hearing on the consolidated appeals, the Administrative Law Judge rendered an Initial Decision, agreeing with Petitioners and the other appealing employees that the essential relevant legal criteria for conducting a reduction-in-force, namely occurrence of a "reorganization" or a "reclassification due to a change of duties" of the positions, were not met (App. 34a).[1] He concluded that despite the Department's contentions that their positions had been abolished due to the establishment of a "new" position, in fact the supposedly old and new "positions are substantially the same and therefore that the Department has failed to prove by a preponderance of the evidence that the RIF was valid" (App. 23a-34a). He added, as the employees also had contended, that the separations were motivated by "reasons personal to the appellants, namely, their party affiliation" (App. 43a), which undisputedly are not among the managerial grounds which justify conducting a reduction-in-force.

Although these determinations applied equally to all the appellants, the ALJ ruled that only those who were veterans should be reinstated with back pay and benefits.

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[1] A reduction-in-force was defined at all pertinent times (5 C.F.R. 351.201(a)) as the release of an employee "because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights." *See* 44 Fed. Reg. 65047, Nov. 9, 1979. This defintion was modified in ways not pertinent to the present dispute by a regulation published at 48 Fed. Reg. 49464, Oct. 25, 1983.

He denied Petitioners relief, and held that their appeals should be dismissed for lack of jurisdiction on the following theory (App. 44a):

> "Non-veteran appellants may appeal agency action taken in a true reduction in force. Having found, however, that the purported reduction in force was a removal action personal to the appellants, appellants must show some other jurisdiction basis for the Board to hear the removal appeals of the appellants. These appellants have failed to show any such basis for the Board to accept their appeals."

On January 31, 1985, the Board issued its Opinion and Order denying the Petitions for Review of the Initial Decision filed by both the Department of Agriculture and Petitioners (App. 10a-20a). It noted, on the Department's Petition, that the major issue for its consideration "is whether a reorganization occurred," within the meaning of the reduction-in-force regulations.[2] It held that "there must be a change of substance" in the functions or duties of the office to warrant recitation of a "reorganization" as a justification for a RIF (App. 12a). It agreed with the Initial Decision that the requisite showing of a change in duties and functions had not been made (App. 14a).

The Board also sustained the ruling that it had no jurisdiction over the appeals of the non-veterans. It stated (App. 18a-19a) that they

> "do have such [appeal] rights under the RIF regulations, but not under adverse action procedures. Because the ALJ found that what occurred in these cases was not a RIF but was actually a removal 'for cause,' in keeping with the court's direction in *Horne* [*Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982)], he examined the appellants' 'tenure rights' before determining what disposition was proper."

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[2] At the Board level, the Department of Agriculture abandoned any contention that a "reclassification due to change in duties" had occurred.

Petitioners sought review in the United States Court of Appeals for the Federal Circuit. They argued, *inter alia*, that the Board's decision offended the plain language of the governing regulation (5 C.F.R. § 351.901) granting them appeal rights from reductions-in-force; that denying jurisdiction based on their prevailing on the merits at the trial was not an appropriate treatment of a "jurisdictional" issue; that the Board's action violated the *Chenery* rule that an agency action must stand or fall on the grounds on which the agency took it; and that the Board's denial of jurisdiction was inconsistent with many of its prior decisions.

The Federal Circuit affirmed (App. 1a-9a). Its essential rulings were that (1) the *Chenery* rule does not apply to the Board because it is an administrative agency, not a court (App. 6a, 8a) and (2) a reduction-in-force which is abusive of the authority to take such actions will not be considered a reduction-in-force because it is tantamount to an adverse action (App. 5a, 7a).

REASONS FOR GRANTING THE WRIT

The Federal Circuit has erroneously decided important issues of administrative law and personnel law, which affect the rights of hundreds of thousands of federal employees,[3] and the adjudications of a number of federal agencies. Its ruling cannot be squared with the leading

[3] As of January 1986, there were 1,041,618 permanent civilian employees in the Excepted and Senior Executive Services. *Federal Civilian Workforce Statistics, Monthly Release, Employment and Trends as of January 1986* (OPM MW 8603, 1986), p. 30. Although we do not have exact statistics as to how many of these were in the Senior Executive Service, it is on the order of two percent of the stated total. Of the total Excepted Service employees, two-thirds are in the Postal Service. *Id.*, p. 32. The Office of Personnel Management has provided us statistics which indicate that exclusive of the Postal Service and certain other agencies, there were on March 31, 1986, 266,693 permanent Excepted Service employees, of whom 73.2 percent, or 195,206, were non-veterans.

decisions of this Court, and conflicts with a decision of the District of Columbia Circuit.

I. THE DECISION BELOW VIOLATES THE *CHENERY* RULE, AND THE DECISION OF THIS COURT IN *VITARELLI* v. *SEATON*, 359 U.S. 535 (1959), AND CONFLICTS WITH A DECISION OF ANOTHER CIRCUIT.

The ruling below, that the Merit Systems Protection Board may disregard the *Chenery* rule, solely because it is an administrative tribunal rather than a court, warrants review and reversal by this Court. *Chenery* sets forth a "simple but fundamental rule of administrative law," that agency action must be judged "solely by the grounds invoked by the agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

In personnel cases this rule has long been applied to require that the employing agency's actions be reviewed solely under the personnel authority it invoked. One of the precise holdings of *Vitarelli* v. *Seaton*, 359 U.S. 535, at 545-546 (1959), was that even a subsequent action against an untenured employee could not cure the illegality of an action taken under some authority other than the agency's power summarily to dismiss him.

If this were a direct judicial review of the Department of Agriculture's action, *Vitarelli* would require, beyond debate, that that action stand or fall under the reduction-in-force regulations that the agency invoked, and that the affected employees be given the appeal rights set forth in those regulations, 5 C.F.R. 351.901. On its face *Vitarelli* commands that, having found the reduction-in-force invalid, the Board should have granted Petitioners relief, leaving it to the agency to invoke a proper personnel authority, *in futuro*, if it should then choose to separate them.

The distinction relied on by the Federal Circuit was explicitly rejected by the District of Columbia Circuit in

Horne v. *M.S.P.B.*, 684 F.2d 155, 157-158 (D.C. Cir. 1982), with which the decision below conflicts:

> "The same [*Chenery*] rationale applies when the reviewing body is an administrative tribunal rather than a court. Simply put, the Board should not be in the business of affirming administrative decisions based upon how an agency might have acted if it had followed proper procedures. The role of review is to evaluate agency discretion as it has been exercised."

Moreover, the Federal Circuit's distinction is unsound. The poignant and often-quoted explanation of the rule by Justice Frankfurter in concurring on the relevant point and dissenting in part on other grounds in *Vitarelli*, is most germane (359 U.S. at 546-547):

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged [citing the first *Chenery* decision]. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service* v. *Dulles*, 354 U.S. 363. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

This rule of law both respects the underlying agency action by treating it on its own terms, and commands the agency to act with integrity. A decision that, if after a hearing it turns out that the agency was abusing the personnel authority invoked, the Board may simply treat the action as one under a different authority granting the employees no rights—one the agency denied it was using—actually rewards deviousness. It also gives no independent force to the explicit legal requirements of the personnel authority invoked by the agency and the appeal rights attendant to them. In *Vitarelli*, that was the loyalty-security regulations, here the reduction-in-force

regulations. We can discern no basis for holding that this rule of law may be disregarded whenever an independent administrative board is the reviewing forum. The high standards it demands should apply in all cases and should not turn on whether it is a court or an administrative board reviewing the agency's actions.

In general, "[t]o the extent that administrative adjudications resemble courts' decisions—a very great extent —the law worked out for courts does and should apply to agencies." 4 K. Davis, Administrative Law Treatise § 21.9, p. 78 (2d ed. 1983), quoted in *University of Tennessee* v. *Elliott*, —— U.S. ——, 106 S.Ct. 3220, 3226 n.6 (1986). Indeed, the Merit Systems Protection Board was created in 1978 as an "independent" agency, which "will act in most respects as a quasi-judicial body," precisely to disentangle such duties from those assigned to the Office of Personnel Management of making and administering personnel policy. S. Rep. No. 95-969, Civil Service Reform Act of 1978, 95th Cong. 2d Sess. 4-7 (1978).

The ruling below has potential impact not only on this Board, which has decided more than 72,500 appeals and review petitions in its short existence,[4] but on a number of other administrative tribunals.[5] With respect to this

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[4] 1985 Annual Report of the Merit Systems Protection Board, at p. 5.

[5] These include independent arbitrators of personnel disputes under public employee collective bargaining agreements (5 U.S.C. § 7121), who generally are subject to the same legal rules as the Board, *Cornelius* v. *Nutt*, 472 U.S. ——, 105 S.Ct. 2882, 2889-2890 (1985); the Foreign Service Grievance Board (22 U.S.C. §§ 4131(c), 4135), which hears personnel disputes for several foreign service agencies; and the Occupational Safety and Health Review Commission (29 U.S.C. § 661) and Federal Mine Safety and Health Review Commission (30 U.S.C. § 823), which adjudicate complaints of the Department of Labor against private firms.

Other *fora* independently review actions of their own departments. The Judicial Officer of the Department of Agriculture (7

Board, the applicability of *Chenery* and *Vitarelli* affects not only the issue presented in this case, but also such matters as whether the agency can defend adverse actions on grounds other than those on which they were taken, and whether it must defend discipline under the legal authority it specified in taking the action, *viz*, Chapter 43, 5 U.S.C. §§ 4301 *et seq.* (performance based actions), or instead Chapter 75, 5 U.S.C. § 7501 (general adverse actions). Until this decision, it appeared settled that agency defenses, and the Board's review, were so limited.[6]

C.F.R. § 1.145), who conducts on-the-record appellate proceedings under various programs, considers that in reviewing actions of parts of the Department, "we are not free to ascertain all the administrative avenues legally open and to command that one of these rather than another be followed. The administrative action has been taken by the market administrator . . . and our jurisdiction . . . extends only to whether the *administrative action taken is legally valid.*" *Crowley's Milk Co.*, 9 A.D. 1171, 1183 (1950). Other such review proceedings are conducted by the Federal Energy Regulatory Commission, 42 U.S.C. § 7172(d); *cf. Caribou Four Corners, Inc.*, 34 FERC ¶ 61,240 (1986), at p. 61,417 (overturning Department of Energy determinations because "DOE, like all federal agencies, is bound by its orders and regulations"); the Interior Department Board of Land Appeals (43 C.F.R. §§ 4.1(a)(3), 4.410), which reviews Bureau of Land Management actions on an arbitrary and capricious standard, *e.g., United States* v. *Maher*, 79 I.D. 109, 112 (1972); and its Surface Mining and Reclamation Appeals Board (43 C.F.R. § 4.1101).

Article I courts have considered themselves bound by *Chenery*. *Budd Co.* v. *United States*, 1 CIT 67, 76, 507 F. Supp. 997, 1004 (1980) (Court of International Trade review of International Trade Commission rulings).

[6] *E.g., Hook* v. *Tenn. Valley Auth.*, 18 M.S.P.R. 294, 296 (1983) ("The Board, however, will not sustain the agency's action on charges that could have been brought, but were not"); *cf. Wilson* v. *Department of HHS*, 770 F.2d 1048, 1054 (Fed. Cir. 1985) (where action based on Chapter 43, demoting employees for poor performance was invalid, remand to Board for reconsideration under Chapter 75 is not appropriate, for that would "change the nature of the proceeding completely after the fact . . .").

The rule of *Chenery* and *Vitarelli* is among the most firmly settled and salutary ones of administrative law. For decades it has contributed substantially to the rule of law and fairness in administrative proceedings throughout the government. Review by this Court is warranted to correct and forestall major and unsound incursions into that rule.

II. THE DECISION BELOW IS ILLOGICAL AND DEBILITATING TO SOUND GOVERNMENT PERSONNEL ADMINISTRATION. IT PERMITS THE BOARD TO DEPART FROM PRIOR PRACTICE WITH NO EXPLANATION.

The error of the decision below is not restricted to the departure from the *Chenery* rule. That decision is unsound in additional ways that substantially impair longstanding personnel law, and provide further reason for review by this Court. If left standing, the Federal Circuit's ruling will deprive hundreds of thousands of federal employees who are not protected by the veterans' preference laws of the right to appeal from abuses of the reduction-in-force authority. Also of great importance is its construction of the Congressional intent that the Board "order corrective action" when "abuses or violations of law have occurred," [7] as a charter for the Board to improve on the agency action in order to *avoid* giving relief from such abuses (App. 7a). This involves the Board in the very managerial decisions from which Congress meant to exclude it (see above), and compromises its independence.

A. The Board Departed From Prior Practice Without Explanation.

Until this ruling, the Board, and the Civil Service Commission before it, had held that the appeal procedures of 5 C.F.R. § 351.901 encompass allegations both that the

[7] S. Rep. No. 95-969, *Civil Service Reform Act of 1978*, 95th Cong., 2d Sess. 24 (1978).

requisites for taking a reduction-in-force (such as occurrence of a reorganization or abolition of a position due to lack of funds) were not met, and that the action was taken for reasons personal to the employee (such as his performance, or political affiliation).

In its leading reduction-in-force decision, *Losure* v. *ICC*, 2 MSPB 361, 365-366 (1980), the Board held both those questions "appealable to the Board. 5 CFR § 351.-901." Long before that, in one of the most prominent cases involving the abuse of RIF procedures, the Decision of the Chief, Appeals Examining Office, United States Civil Service Commission of September 13, 1973 is styled "Appeal of A. Ernest Fitzgerald *Under Part 351*, Subpart I of the Civil Service Regulations" (emphasis added).[8] Although the particular employees in those two cases were veterans, the appeal right under Part 351, set forth in § 351.901, applies to "each civilian employee in: (1) the executive branch of the Federal Government . . .," 5 C.F.R. § 351.202(a)(1). As might therefore be expected, the Board has entertained appeals taken by persons who were in the Excepted Service and not preference eligible veterans. *E.g.*, *Sahni* v. *District of Columbia Government*, 4 MSPB 252 (1980); *Wright* v. *Federal Aviation Administration*, 11 MSPB 167 (1982); *Horne and Miller* v. *ICC*, 5 MSPB 259 (1981), *rev'd on other grounds*, 684 F.2d 155 (D.C. Cir. 1982).

The Ninth Circuit has cited 5 C.F.R. § 351.901 as the jurisdictional basis for the Board's considering just such contentions raised by a non-veteran in the Excepted

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[8] Other Civil Service Commission rulings also rest jurisdiction over such contentions upon Part 351. *See* CSC Appeal Docket SF035150089, May 5, 1975. There an appeal raising the same issues was characterized as "within the purview of Part 351," and the CSC's Regional Chief Appeals Officer held "that the requirements of Part 351 . . . were not met in effectuating the reduction in force" because it was infected by reasons personal to the employee, namely his alleged poor performance.

Service. *Mead* v. *M.S.P.B.*, 687 F.2d 285, 286 (9th Cir. 1982).[9] The Board has entertained appeals affecting dozens of employees from actions denominated as reductions-in-force, raising similar contentions, with no mention of their status as preference eligibles, or lack of it, and no indication that that was deemed relevant.[10] The authority cited by the Federal Circuit (App. 7a-8a) as supposed precedent that a contrary practice existed, simply does not support that premise.[11]

The Board's present decision holds that such allegations of abuse of the reduction-in-force regulations are

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[9] The status of the employee in *Mead* appears in the Board's decision. 8 MSPB 612, at 617 (1981).

[10] *E.g., Green* v. *Gov't of District of Columbia*, 6 M.S.P.R. 102 (1981) (contention that RIF based on reasons personal to employee, *i.e.*, reprisal for filing grievances, sustained); *Stechler* v. *Dept. of Energy*, 20 M.S.P.R. 23 (1984) (contention that old and new positions were the same and therefore no reorganization occurred rejected on the merits); *Tucker* v. *Consumer Products Safety Comm'n*, 21 M.S.P.R. 621 (1984) (similar contention sustained); *Hoffman* v. *Dept. of Housing and Urban Development*, 22 M.S.P.R. 564 (1984) (similar contention sustained); *Medina-Rodriquez* v. *Veterans Administration*, 21 M.S.P.R. 679 (1984) (attack on *bona fides* of RIF rejected on merits); *Dziedzic* v. *Dept. of Energy*, 24 M.S.P.R. 673 (1984) (contentions both that position did not change and RIF not *bona fide*; first contention sustained); *Hill* v. *Dept. of Commerce*, 25 M.S.P.R. 205 (1984) (attack on *bona fides* of RIF rejected on merits); *Nielson* v. *Dept. of Navy*, 26 M.S.P.R. 92 (1985) (contention that "reorganization" motivated by reasons personal to appellant rejected on merits).

[11] The Court below characterized *Hawkins* v. *Dept. of the Army*, 5 MSPB 3 (1981), as treating an agency's RIF notice "not to be a RIF, and appeal rights premised on a RIF were therefore denied." In fact, *Hawkins* held only that an employee *promoted* upon a RIF had no appeal rights, because 5 C.F.R. § 351.901 grants such rights only to persons who suffer adverse consequences such as furlough for more than 30 days, separation, or demotion. The Board noted (5 MSPB at 4) that if Hawkins had been so adversely affected by the RIF "the fact that an employee is neither a preference eligible nor in the competitive service would not affect those appeal rights. *See* 5 C.F.R. § 351.202."

not cognizable under 5 C.F.R. § 351.901, but instead only in adverse action appeals under 5 C.F.R. § 752.405, and therefore only by persons protected by veterans' preference laws. This departure from precedent, and the restriction of employee rights it represented, was done without apparent reason, and without explanation. In this respect, too, the agency action, and the decision below sanctioning it, violate the teachings of this Court. *E.g.*, *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 57 (1983).

B. This Ruling Leads To Irrational Results And Uncertainty In Practice, And A Reversal Of The Proper Burden Of Proof.

The decision below foreshadows irrational results and uncertainty in practice, as a few examples will show. Suppose that two petitioners appealed, one contending only that his position had not changed enough to warrant a conclusion that it had been abolished in a reorganization; and the second contending, in addition, that the action was based on reasons personal to him, such as political ones. Under the Federal Circuit's decision, jurisdiction initially would be assumed to decide the first issue—a "pure" reduction-in-force issue; and the first petitioner would win relief. But the second petitioner, by establishing not only that the RIF was invalid but why it was taken, would thereby prove that it was an "adverse action" and strip the Board of jurisdiction. He would get no relief whatever. On the other hand, if the second petitioner failed in his attempt to show extraneous motivations for the action, but, as here, the agency did not prove that the requisites for taking a reduction-in-force were met, jurisdiction would be accepted and the employee would win.

Second, suppose that one petitioner challenged a RIF on the sole ground that he was not given the full 30 days' notice required by law; and the second asserted that ground, and also that the supposed reduction-in-force

was a sham, taken for political reasons. The Board and Federal Circuit would hold that the petitioner who showed the far more serious violation of law would for that very reason get no relief; indeed his appeal would be dismissed for lack of jurisdiction. The other petitioner, however, could obtain full relief.

The agency has the burden of proving that the requisites for taking a reduction-in-force are met. *See generally Lindahl* v. *OPM*, 470 U.S. 768, 105 S.Ct. 1620, 1624 n. 5 (1985); *Losure* v. *ICC*, 2 MSPB 361 (1980). Thus under the Federal Circuit's view, if the only evidence was the agency's, jurisdiction would be asserted—unless, possibly, the agency proved the wrongful motivation of its own action. One effect of this ruling is unlawfully to shift the burden of proof. *See Lanphear* v. *Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983).

These examples indicate why the law always has been the opposite of the ruling below. They illustrate its irrationality and potential for confusion in personnel administration.

C. It Is Arbitrary And Improper To Deny Jurisdiction Because The Petitioners Won On The Merits.

A final facet of the ruling below meriting consideration by this Court, is that it makes a plenary ruling, after a full trial, that a claim *is* meritorious the predicate for holding that, therefore, there is no jurisdiction over it. This offends the general rule of law that jurisdiction is determined by the situation at the beginning, not the end of a proceeding. *E.g.*, *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-290 (1938) (jurisdictional amount in diversity cases); *Zunamon* v. *Brown*, 418 F.2d 883, 887 (5th Cir. 1968) (same; jurisdiction not decided "by hindsight" or by the "end result" after trial); *Atari, Inc.* v. *J.S. & A. Group, Inc.*, 747 F.2d 1422, 1431-1432 (Fed. Cir. 1984) (*en banc*) (jurisdiction over suit including

patent claims). Seemingly, an employee against whom a personnel action is taken should be able to rely on the agency's characterization of its action in deciding whether he can appeal. It is fundamentally unfair for the reviewing forum to frustrate an apparent appeal right by facilely altering the basis asserted by the employing agency.

This Catch-22 holding of the court below—if you win on the merits, you lose on jurisdiction; if the agency misstates the basis for the discharge there is jurisdiction but only until you prove the truth—entirely departs from the accepted and usual course of judicial proceedings. It promotes disrespect for the law and should be reviewed and reversed by this Court.

CONCLUSION

This Petition for a Writ of Certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2444
85-2469
85-2470

MSPB Docket No. AT03518110533

STEWART G. HUBER, MYRON A. MAIEWSKI, JOHN F. APITZ, BILLY R. BURKE, WILLIAM F. BURNETTE, BRIAN D. BURNS, LARRY E. DAHL, and J. FRED KING,

Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: June 5, 1986

Before MARKEY, *Chief Judge*, FRIEDMAN and NEWMAN, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Petitioners appeal [1] the decision of the Merit Systems Protection Board ("Board"), which dismissed petitioners' appeals for lack of jurisdiction. For the reasons that follow, we affirm the decision of the Board.

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[1] Appeals consolidated on motion of various petitioners. Before the Board the case was captioned *Blalock v. Department of Agriculture*, 28 M.S.P.R. 17 (1985).

Background

Petitioners were employed either as State Executive Directors of the Agricultural Stabilization and Conservation Service or as State Directors of the Farm Home Administration, U.S. Department of Agriculture ("agency"). Petitioners held Schedule A excepted service appointments, without veterans preference ("non-preference eligible"). 5 C.F.R. § 6.2 states that:

> Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

On March 23, 1981, the President issued Executive Order 12300, 46 Fed. Reg. 18,683 (1981), *reprinted at* 5 U.S.C. § 3301 note (1982), which amended 5 C.F.R. § 6.8 to include a new subsection:

> (c) Within the Department of Agriculture, positions in the Agricultural Stabilization and Conservation Service the incumbents of which serve as State Executive Directors and positions in the Farmers Home Administration the incumbents of which serve as State Directors or State Directors-at-Large shall be listed in Schedule C for all grades of the General Schedule.

5 C.F.R. § 6.2 states that:

> Positions of a confidential or policy-determining character shall be listed in Schedule C.

Petitioners were informed by notice issued March 25, 1981 that as a result of the Executive Order their Schedule A positions had been abolished, and that they would be separated by a reduction in force ("RIF") action, effective May 1, 1981. Petitioners were also advised of their right to appeal the RIF to the Board in accordance with Part 351 of 5 C.F.R.

The appeals of these non-preference eligible petitioners were consolidated before the Board with appeals of

the preference eligible employees who had been separated from the same category of positions in the same RIF action. At the hearing before the Chief Administrative Law Judge (ALJ), all appellants asserted that the RIF was invalid because their positions had not actually been abolished, and that they had been separated for political reasons contrary to the First Amendment right of freedom of association.

The preference eligible appellants further asserted that the RIF was devised by the agency to deprive them of their rights as veterans, 5 U.S.C. § 7511(a)(1)(B). These appellants argued that had the agency's action been a removal rather than a RIF, they could have been separated only for cause in conformity with 5 U.S.C. § 7513.

The agency argued that all the appellants' Schedule A positions had become redundant when they were replaced with the new Schedule C positions, and that this constituted a reorganization or reclassification within the RIF regulations. The agency further asserted, in the alternative, that if a RIF had not occurred the appellants would have become occupants of Schedule C positions; and because 5 U.S.C. § 7511(b) denies appeal rights under 5 U.S.C. § 7513 to Schedule C incumbents, the appellants would lack a jurisdictional basis on which to appeal.

The ALJ determined that the duties of the State Director and State Executive Director under Schedule A were substantially the same as under Schedule C, and that incumbents of these positions under Schedule A classification had been subject to displacement upon changes in administration for almost thirty years. He held that "[t]he conclusion is inescapable that there was no reorganization and no reclassification, that the Department's action did not fall within the RIF regulations, and the RIF action was invalid". He stated:

> [T]he actions taken against the appellants were based on reasons personal to them—essentially, not being "qualified" for the confidential and policy-related responsibilities involved. This requires that the actions be viewed as removals "for cause", rather than as reductions in force.

The ALJ held that all of the appellants were Schedule A employees at the time of their removal.

Having concluded that the so-called "RIF" was a removal action personal to appellants, the ALJ held that only those appellants who were preference eligible could invoke the statutory procedural rights of 5 U.S.C. § 7513. As to these appellants, the ALJ held that denial of the opportunity to contest their removal, as provided by statute, constituted prejudicial error and a denial of due process requiring that the removal actions be rescinded as to them. None of those persons is included in the consolidated appeal before us.

The ALJ dismissed the appeals of the non-preference eligible appellants for lack of jurisdiction, premised on these appellants' statutory exclusion from the protections accorded their preference eligible colleagues under 5 U.S.C. § 7511-13, and failure to assert any other jurisdictional basis for appeal. Thus, the ALJ concluded that non-preference eligibles in the excepted service had no right to appeal their removal to the Board, even if such removal had initially been mis-characterized as a RIF. These appellants' assertion of partisan political discrimination was held to be outside the jurisdiction of the Board in the absence of an independently appealable matter.

The Board affirmed the ALJ's decision, from which the non-preference eligible employees now appeal.

Analysis

The issue is whether the Board erred in dismissing the appeals of non-preference eligible excepted service employees after determining that they had been subjected to a removal action and not a RIF action.

A RIF is an administrative procedure by which agencies eliminate jobs and account for employees who occupied abolished positions. It is not an adverse action against a particular employee, but is directed solely at a position within an agency. *Grier v. Department of Health and Human Services*, 750 F.2d 944, 945 (Fed. Cir. 1984). The RIF regulations, as promulgated pursuant to 5 U.S.C. § 3502, state at 5 C.F.R. § 351.201(a)(2):

> Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment rights or restoration rights.

A RIF for the purpose of reorganization is defined as "the planned elimination, addition, or redistribution of functions or duties in an organization". 5 C.F.R. § 351.203.

An employee regardless of preference status who has been separated by RIF may appeal that action to the Board. 5 C.F.R. § 351.901. Petitioners argue on appeal, as they had before the Board, that they were separated by RIF, and that a RIF action does not lose that character for jurisdictional purposes merely because it is later determined not to have been a RIF. Petitioners rely on *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947), wherein the Court said:

> When the case was first here [referring to *Securities and Exchange Commission v. Chenery Corp.*, 318

> U.S. 80 (1943)], we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Petitioners urge that the Board's holding that the action was not a RIF permits the agency to escape the principle that "[h]e that takes the procedural sword shall perish with that sword", quoting from Justice Frankfurter's partial dissent in *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959).

Petitioners thus argue that the agency's initial denomition of the action as a RIF can not be corrected by either the Board or the courts. In so arguing, petitioners confuse the assigned roles of the Board, itself part of the administrative agency structure, and the courts. *See generally Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 153-54 (D.C. Cir. 1982). It is the grounds for the Board's decision on the agency's action that is subject to judicial review, guided by *Chenery* and the controlling statutes.

The RIF regulations, which petitioners argue govern the disposition of their case, explicitly define those actions which constitute RIFs. The Board analyzed the action in view of the regulatory definition, and determined that petitioners were separated not by RIF but by adverse action. This was the result urged by all the appellants before the Board.

The Board rescinded the RIF separations of the preference eligible employees, relief that petitioners assert was unjustly denied to them. The Board granted the preference eligible employees this relief for the reason that the agency had denied them the procedural rights from removals "for cause" to which they, as veterans, were entitled. Petitioners do not dispute that they do not have such rights. Rather, petitioners argue that the Board should not be permitted to treat the agency action as a removal "for cause" when it was initially designated a RIF. Petitioners argue that *Chenery* requires the Board to accept the agency's denomination of its action as a RIF for jurisdictional and relief purposes, even if this denomination is found by the Board to be erroneous.

We discern no such restraint, in the statute or regulations, on the Board's authority in review of administrative personnel actions. *See* Civil Service Reform Act of 1978, S. Rep. No. 969, 95th Cong., 2d Sess. 24, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2746 ("The Merit Systems Protection Board is . . . empowered to determine when abuses or violations of law have occurred, and to order corrective action."); 5 U.S.C. § 1205; 5 C.F.R. § 1201.3.

It is routine for the Board to review the form of agency actions to determine whether they were proper RIF actions. For example, in *Hawkins v. Department of the Army*, 4 M.S.P.R. 462 (1981), an agency's amended RIF notice placing petitioner at a higher grade than the position to which she was reassigned was held by the Board not to be a RIF, and appeal rights premised on a RIF were therefore denied. In *Wright v. Federal Aviation Administration*, 12 M.S.P.R. 545 (1982), a non-preference eligible employee in the excepted service was reassigned with reduced grade and pay, and thus was held by the Board to have been subjected to a RIF to which appeal rights adhere. Such inquiry may affect or determine the basis for jurisdiction of the Board and the

courts. *See, e.g., Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

It is the final administrative decision of the Board, and the basis therefor, that is the subject of judicial review, consistent with *Chenery*. The Board's decision in the case at bar is that the agency's action was not a RIF but a removal for cause, from which these petitioners have no statutory right of appeal. Petitioners assert as "baffling" the Board's reliance on *Horne v. Merit Systems Protection Board*, 684 F.2d 155 (D.C. Cir. 1982), wherein the court vacated and remanded because the requisite formal RIF procedures had not been followed, but stated that remand for such formal removal procedures would be unnecessary if the petitioners, who were in the excepted service, lacked tenure rights. In the case at bar the Board cited *Horne* as authority for omitting remand for formal removal procedures because the petitioners lacked tenure rights. Petitioners argue that the *Horne* court did not intend the interpretation adopted by the Board. Although the *Horne* facts are not squarely in point, we conclude that the Board had discretion to refuse to remand for the purpose of carrying out formal removal procedures that were, on these facts, unavailable to these petitioners.

Petitioners, as excepted service employees without preference eligibility, could have been removed at any time, with or without cause. *Chu v. United States*, 773 F.2d 1226, 1228 (Fed. Cir. 1985). *See also Vitarelli*, 359 U.S. at 539; *Paige v. Harris*, 584 F.2d 178, 181 (7th Cir. 1978). For an employee in the excepted service who is not a veteran, the panoply of protection afforded those in the competitive service is not available. *Fiorentino v. United States*, 607 F.2d 963, 966, 221 Ct. Cl. 545, 549 (1979), *cert. denied*, 444 U.S. 1083 (1980); *Batchelor v. United States*, 169 Ct. Cl. 180, 185, *cert. denied*, 382 U.S. 870 (1965).

Petitioners do not dispute that their Schedule A positions were within the excepted service and that they are not preference eligible. Petitioners therefore were not within the statutory definition of "employee" in 5 U.S.C. § 7511(a)[2], and were correctly denied the statutory and regulatory protection provided for an "employee" subjected to a removal action. *See* 5 U.S.C. § 7513; 5 C.F.R. § 752.401(b). The refusal of the Board to accord petitioners the same relief as was granted to the preference eligible employees is based on this statutory exclusion.

Because the agency could have separated the petitioners without cause, the Board did not abuse its discretion in declining to remand the matter to the agency to reimplement their separation. *See Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. at 88; *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). There were no additional procedural safeguards or steps to which the petitioners could aspire before the agency, no right to a hearing, and no right to appeal to the Board. For these reasons, the decision of the Board is

AFFIRMED

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[2] (a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, . . . who has completed 1 year of current continuous service in the same or similar positions. . . .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number AT03518110533

ROBERT L. BLALOCK, *et al.*,

v.

DEPARTMENT OF AGRICULTURE

OPINION AND ORDER

This case comes before the Board on three separate petitions for review,[1] filed by the agency and six of the appellants, from the January 12, 1983 initial decision of Administrative Law Judge (ALJ) John McCarthy which reversed the separation of twenty four appellants and dismissed the appeals of the remaining eight for lack of jurisdiction.

BACKGROUND

Twenty appellants formerly occupied positions as State Directors (SD) of the Farmers Home Administration (FmHA) and twelve were State Executive Directors (SED) of the Agricultural Stabilization and Conservation Service (ASCS). Each held an excepted appointment under Schedule A[2] and was informed that as a

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[1] Appellants covered by this Opinion and Order are listed in the attached Appendix.

[2] "Positions other than those of a confidential or policy determining character for which it is not practicable to examine shall be listed in Schedule A." 5 C.F.R. § 6.2. *See* 5 C.F.R. § 213.3113 (d) (3) and (e) (4) (1981), setting forth the specific Schedule A exceptions in question.

result of Executive Order No. 12,300 [3] his position had been abolished. The Executive Order provided, *inter alia*, that SD and SED positions "shall be listed in Schedule C [4] for all grades of the General Schedule." Because each appellant was the single occupant of his competitive level and competitive area, each was separated by reduction in force (RIF).

On appeal to the Board the cases were consolidated and assigned to the ALJ for hearing and adjudication.[5] In his decision, the ALJ found that no reclassification warranting a RIF had occurred as a result of the Schedule C designation; no change in duties had taken place either, so that there had been no reorganization; and, in this light, the actions taken were removals for cause rather than RIFs. He then examined the actions as adverse actions and held that none of the procedural protections of 5 U.S.C. §§ 7511-7513 were accorded appellants; that appellants were removed from their Schedule A appointments, not ones in Schedule C; that those appellants who are preference eligibles [6] have a right to appeal to the Board from a removal for cause and that the absence of any of the procedures required by law constitutes harmful error necessitating reversal of the action as to them under 5 U.S.C. § 7701(c)(2)(A); but that non-preference eligibles in the excepted service have no right of appeal to the Board and their appeals must be dismissed.

In its petition for review, the agency contends that the change from Schedule A to Schedule C meets the defini-

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[3] 3 C.F.R. 143 (1982), *reprinted in* 5 U.S.C.A. § 3301 note (1982).

[4] "Positions of a confidential or policy-determining character shall be listed in Schedule C." 5 C.F.R. § 6.2. *See* 5 C.F.R. § 6.8(c) (1982), specifying that SD and SED positions are excepted from the competitive service and are listed in Schedule C.

[5] *See* Board orders dated May 11 and July 16, 28, and 29, 1981, at Tabs 1, 3, 4, and 5 of the record.

[6] Defined at 5 U.S.C. § 2108(3).

tion of a reorganization and that RIF action was, therefore, proper; that even if the actions are viewed as adverse actions they are not reviewable since the Executive Order itself effected the change to Schedule C and removal from a Schedule C job is not appealable; and, considering these arguments, that there has been no harmful error and so no basis for reversal.

The non-veteran FmHA appellants assert that it was improper to dismiss as to them because they were separated by RIF and 5 C.F.R. § 351.901 provides the Board with jurisdiction over RIF appeals. Appellant Burke, in his own petition for review, argues in support of the position taken in the FmHA appellants' petition. Neither of the ASCS non-preference eligibles filed a petition for review.

ANALYSIS

An agency is required by 5 C.F.R. § 351.201(a) to apply RIF regulations:

> when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights.

The major issue for the Board's consideration in this case is whether a reorganization occurred. Reorganization "means the planned elimination, addition, or redistribution of functions or duties in an organization." 5 C.F.R. § 351.203(f). As the Board has previously noted, "reorganization" is a term which is broad enough to cover a multitude of legitimate management considerations, but there must be a change of substance to warrant its recitation as justification for a RIF. *Losure* v. *Interstate Commerce Commission*, 2 MSPB 361, 363-364 (1980). *See also Fitzgerald* v. *Hampton*, 467 F.2d 755

(D.C. Cir. 1972); *Keener* v. *United States*, 165 Ct. Cl. 334, 338 (1964). Thus, the Board must look beyond the reason stated by the agency in order to determine whether a change occurred in fact or whether it was only on paper. *Fitzgerald, supra*, at 758-759; *Losure, supra*. Accordingly, where an appellant whose former position is abolished or reclassified asserts that the duties of his position are the same after the RIF as before it, the Board has consistently examined the totality of the evidence, including the official position descriptions, the parties' testimony, and other evidence of the actual duties of the job.[7] *See, e.g., Ryba* v. *Department of the Navy*, MSPB Docket No. DC03518210219 (December 16, 1983); *Bodrick* v. *D.C. Government*, 7 MSPB 114 (1981); *Chavez* v. *General Services Administration*, 5 MSPB 366 (1981); *Phelps* v. *Department of the Interior*, 4 MSPB 410 (1980).

In the instant case, the ALJ examined the SD and SED jobs as officially described under both Schedules A and C, compared and contrasted specific portions of the language used, discussed the positions of the parties, and cited specific testimony of agency witnesses. *See* initial decision at 8-16. From this, he concluded that the language in the old and the new position descriptions is "plainly different in some respects," initial decision at 12, but that agency officials with firsthand knowledge of

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[7] *Cf. Lester* v. *U.S. Department of Education*, MSPB Docket No. DC03518210311 (October 27, 1983) (the official position of record of the employee who displaces the appellant determines the displacing employee's RIF rights); *Frankel* v. *Department of Education*, MSPB Docket No. PH03518210198 (October 3, 1983) (RIF rights of an appellant on detail stem from his official position assignment and not the detailed position); *Aronson* v. *Department of the Navy*, 4 MSPB 379 (1980) (in determining whether an appellant is qualified for assignment to other positions, where there is no showing that the position descriptions of those jobs are inaccurate, they are properly relied on as "useful evidence" on the issue).

the way in which the Schedule A positions functioned testified to the effect that the essential characteristics of a Schedule C appointment were attributable to the job as performed under Schedule A. That is, he found from the evidence before him that there was, in fact, no change in duties as a result of the change in the nature of the appointment from Schedule A to Schedule C, and noted that, in a sense, there had not even been a change in qualifications as the agency had argued, because incumbents of the Schedule A positions have been displaced when there has been a change in administration for nearly 30 years.

The Board finds that the agency's petition for review, which is set forth in terms of a challenge to the ALJ's conclusion of law that a reorganization did not occur, for the most part constitutes an attack on his factual finding that there was no change in duties. Where the petitioning party challenges such fact findings, his burden is made more difficult by the deference which the Board gives the presiding official's opportunity to observe the demeanor and hear the testimony of the witnesses. *Weaver* v. *Department of the Navy*, 2 MSPB 297, 299 (1980). We find that the agency has not made a sufficient showing of specific evidence in the record to demonstrate error. Rather, the record amply demonstrates, as the agency itself states in the petition, that the "recommendation was made to the Secretary [of Agriculture] that the positions be designated as Schedule C, on the grounds that that designation more accurately reflected the actual duties and relationships of the position than the Schedule A designation." Petition for review at 12.

Insofar as the agency's petition in this respect is not directed toward the ALJ's fact findings, we hold that it is insufficient to show error in the initial decision. Because the regulatory definition of reorganization requires that there be a change in "functions or duties", 5 C.F.R.

§ 351.203(f),[8] we do not attach determinative weight to the fact that the new position descriptions provide for a better defined relationship with and more direct accountability to the administration, inasmuch as neither of those factors has, under the circumstances of this case, been shown to have created a change in the way in which the duties of the positions were being performed.[9] Moreover, while it is true, as the agency asserts, that the change in appointment from Schedule A to Schedule C would be sufficient to require that the two positions be in different competitive levels,[10] that fact is not dispositive of the issue which is before the Board.[11]

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[8] *See also* Federal Personnel Manual Chapter 351, subchapter 3-5.

[9] By Order dated July 13, 1984, the Board sought the views of the Office of Personnel Management (OPM) on whether the change of the positions from Schedule A to Schedule C necessarily meant that a change in duties occurred. OPM contended, in response, that positions are not changed; rather the Schedule A position is abolished and a new Schedule C job is established to which some of the functions of the Schedule A job are redistributed. Moreover, it contends that "duties" may be defined to include not only the day to day functions of a position but also the performance of such duties within the confidential relationship with one's superiors. Thus, OPM asserts that the creation of the Schedule C job "presupposes a change in . . . duties." For the reasons stated above, under the circumstances of this case, we decline to defer to OPM's position in this regard, which is unsupported by references to the record or to law, rule, regulation, or other authority.

[10] 5 C.F.R. 351.403(b)(2) provides that "[a]mong excepted positions, each agency shall establish separate competitive levels for positions filled under different appointment authorities."

[11] The agency also asserts that the ALJ's decision is inconsistent with the Board's decision in *Killingsworth* v. *Department of Health and Human Services*, 10 MSPB 237 (1982). In that case, the Board determined that the agency's decision to abolish temporary or term excepted service positions and replace them with permanent competitive service positions constituted a reorganization which properly called for the invocation of RIF procedures. Although the facts upon which this conclusion was based were not

Accordingly, based upon the record in this case, we concur with the ALJ that RIF proceedings were not properly invoked. Although the changed relationships, accountability, tenure, and other such factors which may generally result from appointments under different authorities would be likely to create substantive differences in the functions or duties in an organization so as to justify a RIF, the record in these cases is simply insufficient to show such changes.

The agency next contends that if the action is found not to be a RIF, it should be viewed as a "conversion and discharge." Petition at 36. Basically, the agency argues that if, as the ALJ found, no new positions were established, then the Executive Order simply redesignated the Schedule A jobs as Schedule C jobs during appellants' incumbency. The agency thus asserts that it was unnecessary for it to take any action to abolish the Schedule A positions before appellants could be separated from the Schedule C jobs to which they had been "converted". Because an employee with a Schedule C appointment is excluded from the coverage of the law on adverse actions,[12] the agency concludes that the discharge was proper and unreviewable.

The agency has put forth a lengthy analysis on the question of whether, in spite of the clear language of 5 U.S.C. § 7511 (b) (2), *see* n.12, *infra*, the President retains authority to exclude these positions from the coverage of 5 U.S.C. Chapter 75. The Board finds it

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fully detailed in the decision, to the extent that it may be contrary to the holding of the instant case, our decision in *Killingsworth* is hereby overruled.

[12] *See* 5 U.S.C. § 7511 (b) (2), providing that persons not covered by the adverse action requirements of law include those whose positions have been determined to be confidential or policy determining by the Office of Personnel Management for positions it has excepted from the competitive service, or by the President for positions excepted by statute.

unnecessary to resolve each point of the agency's argument in this regard, though, because of our agreement with the ALJ's conclusions that appellants were not removed from their Schedule A appointments solely as a result of the Executive Order, and that some properly executed personnel action was necessary to divest them of their Schedule A appointments. *Roth* v. *Brownell*, 215 F.2d 500 (D.C. Cir.), *cert. denied*, 348 U.S. 863 (1954). *See also Saltzman* v. *United States*, 161 Ct.Cl. 634 (1963). In its response to the Board's Order, OPM agrees that some action must be taken to effect the separation of the employee, either through RIF or adverse action. While it is true, as the agency points out, that the situation in *Roth* (and, indeed, in *Saltzman*) involved an employee who was changed from the competitive service where he had greater job retention rights, to the excepted service, that fact does not affect our conclusion. Although the employee's competitive status may determine his entitlement to certain appeal rights,[13] the decisions in both cases were predicated upon findings that neither the President by Executive Order (*Roth*) nor Congress by statute (*Saltzman*) had effected the employee's removal from his prior appointment. Thus, additional actions were necessary to effectuate the employee's conversion. We find that the same is true here.[14]

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[13] *See Padilla* v. *Equal Employment Opportunity Commission*, MSPB Docket No. SFO7528110845 at 8 (November 2, 1983).

[14] In this regard, we note the agency's earlier position, which accords with our finding here, that "Respondents submit that the [Executive] Order was legal, and that, *in order to effectuate the President's intent, it was logically and administratively necessary to abolish the Schedule A positions.* The applicable means to fulfill that requirement was through RIF procedures which resulted in appellant's termination." (Emphasis added.) *See* Volume II, Tab 42 of the record, "Respondent's Statement of Disputed Facts, Summary of Evidence, and Identification of Witnesses," at 3, paragraph 9.

The agency's final argument is that appellants failed to show harmful error in these actions. This position, however, is based only on the contentions which the Board has here rejected. Accordingly, we will give it no further consideration.

The petitions for review filed on behalf of six of the non-preference eligible appellants, as noted above, assert error in the ALJ's decision because of its failure to reverse their separations. They argue that because they were removed as a result of the application of RIF regulations, and since those regulations provide a right of appeal to the Board, the improper RIF should be reversed.

As a general rule, it is true that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities and Exchange Commission* v. *Chenery*, 332 U.S. 194 (1947). This rationale has been applied to the action of the Board in reviewing the decision of an employing agency. *Horne* v. *Merit Systems Protection Board*, 684 F.2d 155 (D.C. Cir. 1982). In that case, the agency had demoted two employees without adherence to RIF procedures. In reviewing the actions, the Board determined that the actions should have been RIFs and examined them as if they had been taken that way. The court found that rather than adjudicate a RIF which never occurred, the Board should have remanded the action to the agency for disposition pursuant to proper (RIF) procedures. However, the court went on to note that "[a] remand would be unnecessary if petitioners had no job tenure rights." *Id.* at 158. In this case, these six appellants do have such rights under the RIF regulations, but not under adverse action procedures. Because the ALJ found that what occurred in these cases was not a RIF but was actually a removal "for cause," in keeping with the court's direc-

tion in *Horne*, he examined the appellants' "tenure rights" before determining what disposition was proper. As to the preference eligibles, he found that they had rights which were enforceable by the Board and reversed those actions because of the agency's failure to provide them to appellants. As to the non-preference eligibles, however, as he correctly found, they have no rights under 5 U.S.C. Chapter 75 which the Board may enforce. Nor would appellants' assertion of partisan political reasons for their removal bring the matter within the scope of the Board's authority, in the absence of an otherwise appealable matter. *See, e.g., Wren* v. *Department of the Army*, 2 MSPB 174 (1980). Thus, those appeals were properly dismissed.

Accordingly, each of the petitions for review is hereby DENIED.[15]

The agency is hereby ORDERED to cancel the separation actions of the twenty four appellants, as directed by the ALJ, to award backpay and benefits in accordance with 5 C.F.R. § 550.805, and to submit proof of compliance with this order to the Office of the Clerk, Merit Systems Protection Board, within twenty days of receipt of this decision. In accordance with 5 C.F.R. § 1201.181 (a), any petition for enforcement of this order must be filed with the ALJ.

This is the final decision of the Merit Systems Protection Board in this case. The initial decision shall become

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[15] In light of this disposition we have not addressed the merits of appellants' allegation, raised to the ALJ, that the action violated their First Amendment freedom of political affiliation. Nor do we find it necessary to adjudicate appellants' claim that the Board has the authority to review the propriety of the Executive Order. As to the preference eligible employees, having reversed the RIF, the propriety of that Order is moot, and as to the non-preference eligibles, it would provide no basis for asserting jurisdiction over their appeals.

final five days from the date of this Order. 5 C.F.R. § 1201.113(c).

The appellants are hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after each appellant's receipt of this order.

FOR THE BOARD:

Jan. 31, 1985
(Date)

Washington, D.C.

/s/ Robert E. Taylor
ROBERT E. TAYLOR
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
Docket No. AT03518110533

ROBERT L. BLALOCK, *et al.*,*
Appellants

v.

U.S. DEPARTMENT OF AGRICULTURE,
Respondent

and

OFFICE OF PERSONNEL MANAGEMENT,**
Intervenor

INITIAL DECISION

By: John J. McCarthy Date: January 12, 1983
Chief Administrative Law Judge

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* In addition to Mr. Blalock, appellants are: John F. Apitz, Wallace D. Brunton, William E. Burnette, Brian D. Burns, Drew Cloud, William E. Curry, Lawrence E. Dahl, Frederick William Defield, John T. Denyer, Wallace B. Edland, James W. Facemire, J. Fred King, Rudolph W. Knoll, Joe T. McCarter, Lowell A. Pannell, Edward A. Ragland, Keith Sattler, Karl G. Smith, and Jack M. Weiland, former State Directors of the Farmers Home Administration; and Billy B. Burke, Ralph H. Cochran, Stewart G. Huber, Loyd R. Jones, Carl J. Kaufman, Myron A. Maiewski, William L. O'Daniel, Carl J. Otto, Clyde R. Payne, Freling H. Scarborough, Wayne Testerman, and D. L. Triggs, former State Executive Directors of the Agricultural Stablization and Conservation Service.

** After intervening, the Office of Personnel Management filed no further pleadings.

With appearances by:

Walter H. Fleischer and Stanley Rothstein of Cole & Groner, Attorneys for certain FmHA appellants; Clyde R. Payne, representative for certain ASCS appellants; Thomes E. Edmondson and Virginia Strasser, Attorneys for Department of Agriculture.

Appellants, several of whom are veterans, are 20 former State Directors (SD) of the Farmers Home Administration (FmHA) and 12 former State Executive Directors (SED) of the Agricultural Stabilization and Conservation Service (ASCS). Both agencies are components of the Department of Agriculture. Appellants' positions were in Schedule A of the excepted service.[1]

Appellants were advised on 30-day notice that their positions had been abolished, and they were dismissed in a reduction in force (RIF). They are entitled to appeal under 5 U.S.C. § 7701(a) to this Board because reductions in force are made appealable by section 5 U.S.C. § 351.901.[2] Their appeals were consolidated by order of the Board and assigned to the administrative law judge for hearing and issuance of an initial decision. Following a period of discovery under the regulations of the Board, a hearing was held in Washington, D.C. Thereafter, briefs were filed by the parties.

Appellants' Contentions

Appellants allege that the RIF was invalid because their positions were not abolished and they were separated for political reasons contrary to their First Amend-

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[1] Schedule A includes positions "other than those of a confidential or policy-determining character for which it is not practicable to examine." 5 C.F.R. § 6.2.

[2] 5 C.F.R. § 351.901 provides:

An employee [in the Executive branch of the Federal Government (§ 351.202(a)(1)] who has been affected by a reduction-in-force action and who believes this part has not been correctly applied may appeal to the Merit Systems Protection Board under the provisions of the Board's regulations.

ment right of freedom of association. Appellants also assert that the RIF action was devised to deprive them of their rights as veterans under 5 U.S.C. § 7511(a)(1)(B); and that had they been removed, rather than RIFed, they could have been separated only for cause and in conformity with 5 U.S.C. § 7513(b). The Department contends that appellants' Schedule A positions became redundant when they were replaced by new Schedule C[3] positions and that this constituted a reorganization or reclassification within the meaning of the RIF regulations. The Department latterly contends that if there was no RIF appellants' positions were converted to Schedule C; that as encumbents of Schedule C positions appellants could not claim procedural or appeal rights under 5 U.S.C. § 7513 because section 7511(b) denies those benefits to all holders of policy-making (Schedule C) positions; and, therefore, that their rights have not been infringed by their termination.

Upon careful examination of the extensive record, weighing of the evidence, and analysis of applicable law, I conclude that the Schedule A and Schedule C positions are substantially the same and therefore that the Department has failed to prove by a preponderance of the evidence that the RIF was valid. *Losure* v. *ICC*, 2 MSPB 361 (1980). In the absence of a valid RIF, veterans may be removed only for good cause and in the manner prescribed by 5 U.S.C. § 7513(b). I find that the dismissal of the appellant-veterans did not meet the procedural requirements of section 7513.

Discussion

1. *Background of the Reduction in Force*

The evidence shows the following sequence of actions. Early in January 1981, preparatory to the change in ad-

[3] Schedule C positions are those "of a confidential or policy-determining character." 5 C.F.R. § 6.2.

ministration, the Department began to consider how to terminate the appellants.[4] Discussions of the options took place at the highest levels of the Department. Taken into account was past and pending litigation initiated by SDs and SEDs who had been separated from the Schedule A positions by dismissal or reassignment in the previous administration. The effect of using a RIF to avoid the exercise of veterans' rights was also considered. It was known that the Civil Service Commission (now OPM) in 1977 had disapproved a proposal to place the ASCS position in Schedule C. The Secretary of Agriculture wanted the positions placed in Schedule C, the Department decided to have them so designated by Executive Order, and a draft was prepared and reviewed by OPM.

On March 23, 1981, the President issued Executive Order 12,300[5] to amend Civil Service Rule VI. By the

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[4] Many of appellants were long-term career employees of FmHA and ASCS who had competitive status before accepting the SD and SED positions. Since the early 1950's when the SD and SED positions were removed from the competitive service and placed in Schedule A, incumbents of those positions had usually been replaced with each change in administration. Non-veterans had been dismissed summarily. Veterans who did not resign upon request had usually been reassigned to other positions with the same grade and pay. Appellants had been advised that if they accepted the Schedule A position in the excepted service, they would not have tenure rights of competitive service employees.

[5] Executive Order No. 12,300, dated March 23, 1981, provides:

> By the authority vested in me as President of the United States of America by Sections 3301 and 3302 of Title 5 of the United States Code, and having determined that it is necessary and warranted by conditions of good administration that certain positions in the Department of Agriculture ought to be excluded from the coverage of Section 2302 of Title 5 of the United States Code, and excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character, in order to ensure their deep involvement in the development and advocacy of Administration proposals and policies and to ensure their effective and vigor-

Order he invoked his authority under 5 U.S.C. §§ 3301 and 3302[6] to amend 5 C.F.R. § 6.8 to include the positions of SD and SED in Schedule C. It was expected that the Presidential designation of the positions as Schedule C would clearly denote the character of these positions as policymaking and thus make incumbents subject to summary removal.[7]

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ous implementation, it is hereby ordered that Section 6.8 of Civil Service Rule VI (5 C.F.R. 6.8) is amended by adding thereto the following new subsection:

(c) Within the Department of Agriculture, positions in the Agricultural Stabilization and Conservation Service the incumbents of which serve as State Executive Directors and positions in the Farmers Home Administration the incumbents of which serve as State Directors or State Directors-at-Large shall be listed in Schedule C for all grades of the General Schedule.

3 C.F.R. 143 (1982); 5 U.S.C. § 3301 (1982 Supp.), note.

[6] In pertinent part these sections provide as follows:

§ 3301 Civil Service; generally

The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

. . .

§ 3302 Competitive service; rules

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—

(1) necessary exceptions of positions from the competitive service.

[7] The Department argues that the Executive Order is not reviewable by the Board or is reviewable only for facial validity. Appellants see no need to challenge the President's authority to issue the Executive Order. Nor do I find any need to question its validity. The issue raised in this proceeding is the validity of the Department's implementation of that Order.

Draft Schedule C position descriptions were prepared and were reviewed at the highest levels of the Department. OPM was consulted to assure that the position description met the criteria for Schedule C.

2. *Basis for Reduction in Force*

The Department applied the reduction-in-force regulations because it believed that the appellants were being released from their competitive levels due to either a reorganization or a reclassification within the meaning of the civil service regulations.[8] It is necessary to determine, therefore, whether a reorganization or reclassification took place so as to require the application of those regulations.

Beyond the general criteria and procedures set forth in the regulations for use in RIFs, the Federal Personnel Manual offers guidance for interpretation and application of the regulations. With regard to the particular issues involved here, the manual states:

> (a) *General.* For reduction-in-force purposes:
>
> (1) Reorganization means the planned elimination, addition, or redistribution of functions or duties in an organization.
>
> (2) Changes that meet the definition of reorganization may by recognized when they occur . . . or at a later date, for example, during a classification survey.
>
> FPM Chapter 351, para. 3-5(a).

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[8] The regulations provide:

> (a) Each agency shall follow this part when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, *reorganization, reclassification due to change in duties,* or the exercise of reemployment rights or restoration rights. 5 C.F.R. § 351.201. (Emphasis added)

The manual also makes it clear that a reclassification due to a change in duties (note 8, *supra*) requiring use of reduction-in-force procedures occurs only when the change in duties causes a reduction in the grade of the position. *Id.* para. 3-5(c). Since all of the positions in question remained at the same grade when changed from Schedule A to Schedule C, I find that no reclassification occurred to warrant a RIF.

The remaining question is whether a RIF was required because a reorganization took place, ie., a planned elimination, addition, or redistribution of functions or duties. FPM Chapter 351, para. 3-5(a)(1). This necessitates a close examination of the duties of the positions involved.

a. Comparison of the Schedule A and Schedule C Position Descriptions for State Director

The Schedule A position description (App. Exhibit K) requires each SD in the FmHa to provide "aggressive leadership in adjusting overall [FmHA] programs to the major needs of the area "by planning, organizing and implementing FmHA programs." Specifically, the Schedule A SD was required to formulate and implement the "total FmHA program within the State" by "developing and implementing operating principles and practices desirable or necessary to promote and achieve the purposes of the overall FmHA programs." The SD develops annual and long-range goals, is responsible for training programs "to insure proper interpretation and effective application" of policies, assures that "program objectives and operations are clearly presented to the public" and institutes "positive action to resolve any problem of acceptance." He/she appropriately emphasizes each activity in the program. The SD is to have "a dynamic public relations program" to enhance the understanding by individuals, groups, and the general public to secure cooperation from outside sources in furthering program goals. Further, he/she is charged with using the re-

sources of the agency to attain the program objectives. A Schedule A SD had "the broadest latitude for independent executive judgment" and was to be guided by laws and regulations, "National Office procedures, instructions and releases, agricultural trends, the Administrator's thinking on basic objectives, and public reaction to FHA programs." The incumbent was expected to have not only a comprehensive and detailed knowledge of, but a "belief in FHA programs and objectives." He/she was to have "exceptional skill in meeting with other agricultural and rural community leaders, representatives of State and Federal agencies, rural residents and farmers and the general public."

The Schedule C position description (App. Exhibit T) in large part repeats, with some editing and considerable elaboration, the duties and responsibilities in the Schedule A position description. However, the following duties, not articulated in the Schedule A position description, appear in the Schedule C position description. The Schedule C incumbent "participates with the FmHA Administrator and top officials in the planning, organizing, implementing, coordinating, and directing of FmHA programs, policies and practices; "recommends policy changes" with respect to his/her area; "represents the President, the Secretary, and the Administrator" in State or local meetings; "advocat[es] the Administrator's position on issues," plans a dynamic public relations program during which he/she not only explains but "defends" the Administrator's policies. Instead of having broad latitude for independent "executive" judgment, the Schedule C incumbent has "broad latitude for independent judgment consistent with Administration policy and objectives." He/she also "works closely and harmoniously with the Administrator and top agency officials in formulating and implementing overall policy and program operations."

Preceding the statement of principal duties and responsibilities is a lengthy introduction in which the incumbent is described as a participant in the development of overall agency policy and as the administration's policy advocate who must "warmly espouse" the administration's goals in rural assistance and development and maintain the Administrator's "trust and confidence."

The Department argues (Resp's Brief 15-17) that the Schedule A job description for the SDs did not accurately reflect either what the SDs did or what the new administration intended for them to do, that new duties "not clearly defined in the Schedule A job description" were "added," along with new relationships and qualifications that make the positions Schedule C. The Department then argues that the change from Schedule A to Schedule C placed the positions under a different appointing authority, that being under different appointing authorities and hence in different competitive levels [5 C.F.R. § 351.403(b)(2)] the incumbents of the Schedule A positions could not readily be transferred to the Schedule C positions because of different qualifications for the position, and that a reorganization as defined in 5 C.F.R. § 315.203(f) occurred for which a RIF is not only appropriate but required.

The Department further contends (Resp's Brief 17-19) that a reclassification took place because of the "change in duties" and qualifications and that if an incumbent could continue in the changed position unless removed for cause the Government could not effectively manage its missions.

The Department argues throughout from conclusions. Whether the Schedule C position is essentially different from Schedule A is a matter appellants dispute.

To explain the difference in the duties described in the position descriptions, the Department relies primarily on

the testimony of John W. Fossum (Resp's Brief 15). Mr. Fossum has been Director of Personnel for the Department for over 3 years, and for 5 years previous he was with the Civil Service Commission (now OPM) where his duties included making recommendations and analyzing proposals to establish positions under Schedule A and Schedule C. He had disagreed with the determination in 1978 to deny a Schedule C designation to the SED position and disagreed with the conclusions in a 1974 report by the Civil Service Commission recommending that Schedule C designations not be given below the regional level.

He testified that while the Schedule A incumbents had in fact performed many of the duties described in the Schedule C job description, there were significant distinctions in the duties and responsibilities described in the Schedule A and C job descriptions for both agencies. He testified that the designations of Schedules A and C were substantially different and that Schedule A was inappropriate for the new position because the new position specified a policymaking and confidential role and that the change met the definition of "reorganization." (Tr. II 181-191)

Exception cannot be taken to Mr. Fossum's testimony concerning the redrafting because the language in the position descriptions is plainly different in some respects and Mr. Fossum was addressing those language differences. But Mr. Fossum's testimony does not advance the Department's argument. More significant is his testimony that there was no reclassification (III 104-112) and that the Schedule A positions "looked, tasted, touched, and smelled like Schedule C" and that probably what had really occurred was a "conversion" from Schedule A to Schedule C (III 126-130).

Weight must also be given to the testimony of other witnesses for the Department. Frank W. Naylor, Jr.,

now the Under Secretary of Agriculture for Small Communities, and from 1973 to 1977 Associate Administrator and Acting Administrator of FmHA, testified that during 1973-77 it was common practice to consult weekly with the SDs to review operations and policy in the field (I-23). He testified that a formula for distribution of FmHA funds was devised with the assistance of SDs during that time (I-34). He considered former SDs to have been advocates of the administration they served (I-55-56, 66) and testified that, like the Schedule C, the Schedule A was probably a confidential employee and a key figure who should probably have been a Schedule C (I-92-94).

According to the testimony of Charles Shuman, the current Administrator of FmHA, and an SD from 1971 to 1977, Schedule A SDs performing their duties in prior administrations "functioned in a fashion similar to the Schedule C." (I-165) He testified that as a Schedule A SD he made "policy" (I-127-29, II 29, II 68); made recommendations regarding national policy (I-130); and considered that he had a confidential relationship with two or three Administrators (I-159.)

The testimony of these latter witnesses is highly probative of whether the Department created new positions. Together, Mr. Naylor and Mr. Shuman had firsthand knowledge of the Schedule A SD position by direct experience and by higher management involvement with Schedule A SDs. They attribute to the Schedule A incumbent the same duties of policymaking and policy-advocating, and confidential relationships that are supposedly the distinguishing factors in the Schedule C position. Thus, although the language differs, the essential characteristics of a Schedule C SD appointment are attributed to Schedule A incumbents by the Department itself.

b. Comparison of the Schedule A and C Position Descriptions for State Executive Director

The Schedule A position description under which the separated SEDs worked describes them as "the highest-ranking full-time official[s] of the ASCS state office" and as "the top authority" within the state on ASCS matters who confer with various inter/intra agency and other planning groups concerning the state agricultural economy or related national defense activities. Among the principal duties and responsibilities, the SED must fully participate in determining, formulating, and establishing ASCS state policies and programs, recommend changes and revisions in state and national policies and programs, appraise the programs within the state, make recommendations for revising and improving the national directives and policies to meet current and specific needs or objectives of the state's programs. The Schedule A SED supplied current program information, fostered cooperation to coordinate and secure assistance for accomplishing joint agricultural objectives from farmers and participating private enterprises; made public appearances to explain ASCS programs; and reported to the Administrator, Deputy Administrator, the Regional Director, and the State Committee on matters involving State office operations and program policy. He/she operated with a minimum of guidance and direction, and the means for achieving the objectives was left largely to the SED.

In the Schedule C position description, the SED is described as "the highest ranking full-time farm administrator in the State office," "the advocate and emissary of the Secretary of Agriculture and the Administrator, ASCS, at the State level," "the Administration's political representative at the State level," "the representative of the President, the Secretary, and the Administrator," and the advocate and defender of the Secretary's position on issues of inter-governmental cooperation and mutual in-

terest and of the administration's farm policies. He/she "participates with other top agency management officials in formulating and developing agency policies, plans, and programs and keeps them advised of significant matters within the State." He/she must "hold policy beliefs and methodology of administering approved programs which are in close harmony with the policies and objectives of the Administrator," must "faithfully reflect the administration's farm policy" and "ensure that it is understood and favorably received," and "must enjoy the trust and confidence of the Secretary and the Administrator in the performance of his duties." The Schedule C SED has "broad latitude for independent judgment consistent with administration policy and objectives."

Despite the differences in language, the Department admits that the change from Schedule A to Schedule C for SEDs conformed the designation to "the pre-existing nature and responsibilities of SED positions," that traditionally Schedule A SEDs exercised broad authority and discretion in formulating, implementing, and advocating policy, and that it was necessary for them to enjoy the trust and confidence of the administration they served (Resp's Brief 48). The admission was necessary because the Department's witnesses testified that Schedule A SEDs made policy; made policy recommendations; advocated the Administrator's program policies; met regularly with administration officials either in the state or in Washington; advocated, defended, and promoted policies of the Department or the Secretary as an inherent part of their obligations; had a confidential relationship with Area Directors in Washington; and were relied on by the Secretary for information as to how programs were being accepted, interpreted, and executed (see II 76, 104, 108-112, 176; III 10-11, 58-60, 65, 97, 142-143, 160). Thus, the Department makes no attempt to argue the SED positions were essentially different under the Schedule A and C descriptions.

2. *Conclusions Respecting the Validity of the RIF*

Despite the carefully crafted differences in language,[9] I find from the preponderant evidence that the duties of the SD and SED are substantially the same under the Schedule A and C position descriptions. The change of the designation from Schedule A to Schedule C reflected and transformed into action the Department's view that the positions had always had the characteristics of Schedule C with respect to policymaking and confidentiality.

The Schedule C position descriptions for the SDs and SEDs effected no substantial change in duties, no change in grade or pay, and, indeed, in a sense no change in qualifications because incumbents have been displaced upon changes in administration for almost 30 years. The conclusion is inescapable that there was no reorganization and no reclassification, that the Department's action did not fall within the RIF regulations, and the RIF action was invalid.[10]

As explained in the discussion that follows, the actions taken against the appellants were based on reasons personal to them—essentially, not being "qualified" for the confidential and policy-related responsibilities involved. This requires that the actions be viewed as removals "for cause," rather than as reductions in force.

Validity of the Removal Action

1. *Appellants' Rights*

My conclusion that the termination of the appellants' employment was based on a misapplication of the RIF regulations necessitates an inquiry into the validity of

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[9] Making the SDs and SEDs representatives of the President appears to be overreaching in the effort to distinguish the positions.

[10] This determination does not resolve the question of whether appellants could otherwise have been dismissed.

the actions under the statutory provisions relating to removals. Generally, employees in the competitive service and preference eligibles ("veterans") in excepted service positions may not be removed except for good cause and in accordance with the procedures set forth in the law, 5 U.S.C. §§ 7511-13. I find that those appellants who are veterans were entitled to the benefits of those provisions and, therefore, could validly be removed only in conformity with the terms of section 7513.

The Department claims that if a RIF did not occur the appellant-veterans were discharged from the Schedule C positions, an action from which there was no right of appeal. It argues that although 5 U.S.C. § 7511(a)(1)[11] includes veterans among the employees entitled to the procedural and substantive rights conferred by section 7513, section 7511(b) excludes all employees who hold Schedule C positions.[12] (Resp's Brief 23-26)

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[11] Section 7511(a)(1)(B) includes in the definition of employee:

> a preference eligible in an Executive agency in the excepted service . . . who has completed 1 year of current continuous service in the same or similar positions.

[12] Section 7511(b) excludes an employee:

> (2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—
>
> (A) the Office of Personnel Management for a position that it has excepted from the competitive service; or
>
> (B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

The reasons for adding this provision were stated by the Senate:

> The concept of tenure and protection against dismissal is contrary to the confidential relationship between incumbent and supervising official, and the commitment to Administration policy objectives, required by those filling such positions.

S. Rep. No. 969, 95th Cong., 2d Sess. 48 (1978); reprinted in Legislative History of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service, Committee Print No. 2, 96th Cong., 1st Sess. 1512 (1979).

The Department reasons that if the RIF should be found invalid, appellants were removed from Schedule C positions either because appellants had been transferred to new Schedule C positions or because their Schedule A positions had simply been redesignated Schedule C as a result of the Executive Order. The Department conjures hypotheticals. Contrary to the Department's contention, appellants were not removed from Schedule C positions. Their personnel papers show they occupied Schedule A positions at the time of removal. As Schedule A employees, they would be covered by section 7513.

Respondent's argument that appellants were removed from Schedule C positions in which they enjoyed no protection against removal is specious, for it fails to consider that some action was necessary to separate appellants from their Schedule A positions. Changing an employee from one position to a different position—whether because of promotion, demotion, removal, transfer, reassignment or some other reason—requires that the personnel action be taken and recorded. Here, respondent seems to argue, once the appellants' positions were changed by executive order from Schedule A to Schedule C, the old Schedule A positions no longer existed. From this it necessarily follows, respondent maintains, that appellants could have been removed only from the Schedule C positions.

However, this analysis fails to consider some basic precepts of the federal personnel system. An executive order is only one type of action that can affect positions in the federal service. A classification decision is another example; it may change the grade of a single position or a group of similar positions. When a classification action changes the grade of a position, a judgment is then made whether to place the incumbent employee in the new position—an incumbent is not automatically changed to the new position. If the new position is at a higher or lower grade, a personnel action must be effected and recorded. If this change would result in a

demotion for the employee, his or her rights under 5 U.S.C. § 7513 cannot be abrogated by reasoning that the classification action somehow transferred the employee to the new, lower-grade position. The demotion action must comply with any applicable procedural requirements.

In sum, a position change is not to be confused with a personnel action affecting the employee. Thus, in the instant appeals, appellants had certain rights as employees in Schedule A positions. Those rights could not be voided or ignored on the basis that their Schedule A jobs were abolished and that therefore they were removed from Schedule C positions in which they were unprotected by 5 U.S.C. § 7513. I find that, as Schedule A employees, the appellants who were preference eligibles could not be changed from one position to a different one and then removed without regard to their rights under section 7513.

These fundamental characteristics of the federal employment system were recognized by the court in *Roth* v. *Brownell*, 215 F.2d 500 (D.C. Cir. 1954), *cert. denied* 348 U.S. 863 (1954). In *Roth*, the plaintiff was serving as an attorney in the competitive service when an executive order was issued in 1947 changing attorney positions to Schedule A of the excepted service. Several years later, in 1953, plaintiff was removed without notice of the reasons or an opportunity to contest his discharge. The Government argued to the court that plaintiff, as a Schedule A employee, did not have the protections accorded competitive-service employees because he had ceased to be in the competitive service when the executive order took effect. The court held that plaintiff had been removed from his competitive-service position without observance of the statutory requirements of (1) advance notice of the reasons for the proposed removal, (2) an opportunity to submit an answer for the consideration of the deciding official, and (3) a written decision on the answer. The court ruled the removal invalid and

ordered that the employee be restored to the rolls of his agency.

Respondent's effort to distinguish *Roth* from the instant appeals fails. The respondent's theory appears to be that, because the statute which grants protections to certain employees, 5 U.S.C. § 7513, also permits the exclusion of employees (and positions) from its coverage through administrative action, 5 U.S.C. § 7511, an administrative determination (by executive order) to place an employee's position outside the scope of the statutory provision operates to extinguish the employee's rights under the statute—to hold otherwise, the argument goes, would defeat the very purpose of the statute. However, this analysis obscures the crucial similarities between *Roth* and the instant appeals. In both situations, the President took an action which affected the positions of the incumbents: in *Roth* the positions were changed from the competitive service to the excepted service; in the present appeals the President took action to change the incumbents' positions from Schedule A to Schedule C within the excepted service. In *Roth*, the court concluded that since the plaintiff did not leave his competitive service position voluntarily, he had been removed from it. The court held that the agency's reliance on the executive order to justify its action was misplaced. The court stated: "Neither the formula of 'excepting' the kind of position a person holds, *nor any other formula*," can obviate the statutory rights held in the *former* position because the statutory rights limit the President's otherwise plenary control over appointments and removals." 215 F.2d at 502 (emphasis added).

Although the court in *Roth* was concerned with distinctions between the rights of competitive service and excepted service employees, the rationale clearly supports the conclusion that excepted service veterans who acquire statutory rights under Schedule A cannot be divested of those rights by executive order.

I find that appellants were removed from their Schedule A positions, not by the executive order but by action of the Department of Agriculture.[13] It remains to be determined whether there was a failure by the Department to accord appellants the procedural rights granted by 5 U.S.C. § 7513 in connection with the termination of their employment and whether any such failure constitutes reversible error.

2. *Applicability of Statutory Procedural Rights*

(a) The rights of preference eligibles

Since I have ruled that appellants were removed from their Schedule A positions and that their rights must be

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[13] Because I have rejected respondent's position that appellants were removed from Schedule C it is not necessary to decide whether the executive order would have excluded appellant-veterans as Schedule C employees from the protections of 5 U.S.C. § 7513. Section 7511(b)(2)(A) and (B), respectively, place outside chapter 75 those employees whose positions were determined to be of a confidential, policy-determining, policy-making or policy-advocating character (1) by OPM for a position it has excepted from the competitive service; or (2) *by the President* or the head of an agency *for a position excepted* from the competitive service *by statute*.

Respondent concedes (Resp's Brief 25-27) that section 7511(b)(2)(B) is inapplicable because it is limited to determinations made by the President or an agency head as to positions excepted by statute—the positions of appellants being excepted by OPM and not by statute.

Respondent urges, however, that section 7511(b)(2)(A) be read so as to impliedly include positions excepted by the President as well as by OPM. It argues that, since OPM derives its authority from the President under 5 U.S.C. §§ 3301 and 3302, the President is not precluded from exercising that authority simply because he delegated it to OPM. Granting that the President has authority to place positions in Schedule C, the question remains whether his action in doing so removes incumbent-veterans from the protections of chapter 75. That question need not be resolved here since I have found that appellants were removed, not from Schedule C, but from Schedule A positions.

determined in reference to their status in those positions, it is necessary, first, to review the applicability of the statutory provisions relating to removals and, second, to assess the effect of any noncompliance with those requirements. In pertinent part the protections granted by 5 U.S.C. § 7513 extend only to an employee in the competitive service or to a preference eligible in the excepted service (exclusive of employees in Schedule C positions).[14] Hence, only those appellants who were preference eligibles can invoke the protection of 5 U.S.C. § 7513. The rights of appellant-veterans will be discussed first. The rights of non-veterans will then be reviewed.

Section 7513(a) requires that a covered employee whose removal for cause is proposed shall be given (1) 30 days' advance written notice of the reasons for the proposed action, (2) a reasonable time to answer orally and in writing and to furnish affidavits or other documentary evidence, (3) the right to have a representative and (4) a written decision. At most it can be said that only the 30 days' advance notice requirement was observed in these cases, that is, by issuance of the reduction-in-force notices. Obviously, the appellant-veterans were neither informed of, nor given the opportunity to exercise, the right to contest the proposed action by submitting an answer orally and in writing.

The denial of the right to present an answer to the notice of proposed termination for the consideration of the official who will make the agency decision results in not only the loss of a valuable procedural right granted by the statute but, at the same time, a denial of fundamental due process. Even in this case where, presumably, the decisions to replace the appellants were made at a high level and not subject to modification or reconsideration, the opportunity to try to convince the deciding officials not to take the proposed action carries some

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[14] 5 U.S.C. § 7511 defines the applicability of 5 U.S.C. 7513.

possibility of success. Indeed, the right to answer when an action under 5 U.S.C. § 7513 is proposed is so essential and important, it has generally been held that denial of the right is a clear error of law so prejudicial as to warrant reversal of the agency action. *Ratley* v. *Department of the Army*, MSPB No. ATO7528110338 (September 17, 1982).

In *Ratley* the agency proposed a 30-day suspension of the employee, pending removal for conduct alleged to be criminal. However, he was given only 24 hours to reply to the charges personally and in writing; the time for oral reply was extended 2 hours. The Board ruled that because 5 U.S.C. § 7513(b)(2) mandates at least 7 days for responding to an agency charge, "any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. . . . [A] suspension taken without complying with the procedural requirements of 5 U.S.C. § 7513(b)(2) clearly constitutes harmful error under 5 U.S.C. § 7701(c)(2)(A)." *Id.* sl. op. 5-6. This ruling followed prior decisions of the Board in *Land* v. *Federal Aviation Administration*, MSPB No. CHO752811-0154 (July 21, 1982) sl. op. 4; and *Cuellar* v. *U.S. Postal Service*, 81 FMSR ¶ 7077 (November 13, 1981).[15] *See*

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[15] *Compare Johnson* v. *Department of the Treasury*, MSPB No. DCO75209213 and DCO75209214 (Aug. 27, 1982). Issued before the Board's decision in *Ratley*, the *Johnson* decision held that 5 U.S.C. § 7513(a) was violated where appellant was offered 7 days to reply to a proposed suspension and removal, and she in fact made an oral reply to the latter but inadvertently a decision on both actions was issued only 6 days after appellant received the advance notices. The Board noted that the presiding official found appellant had waived her right to answer the suspension notice, and that appellant had not shown (1) how her oral reply might have affected the agency's decision to suspend her or (2) how she was prejudiced because the agency's decision was issued 6 days after the notice rather than 7 days as provided by 5 U.S.C. § 7513(b)(2). However,

also, Pulley v. *Department of Health and Human Services,* MSPB Docket Nos. PHO7528110048 and PHO7528110440 (December 1, 1982) (enforced leave deemed suspension without observance of the requirements of 5 U.S.C. § 7513.)

The essential holding in those cases is controlling here. If the failure to afford reasonable time for answering constitutes reversible error, then *a fortiori* it must be held that complete denial of the opportunity to contest the proposed action is prejudicial error requiring the Board to set aside the discharges of the appellant-veterans.

This analysis of appellants' rights is also consistent with the holding and advice of the U.S. Court of Appeals for the District of Columbia in *Horne* v. *Merit Systems Protection Board,* 684 F.2d 155, 157-58 (D.C. Cir. 1982), where the court said:

> [T]he Board should not be in the business of affirming administrative decisions based on how an agency might have acted if it had followed proper procedures.

The situation presented in *Horne* is strikingly similar to what occurred in the cases now under appeal. Two Schedule A attorneys were displaced and demoted when the Commissioners for whom they worked left the ICC and their successors chose others as their legal assistants —apparently plaintiffs were considered to be political employees. Contrary to the view of the agency, the presiding official held that a reduction in force had occurred and that the required procedural protections had not been

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the Board ordered the agency to correct the error by amending the record to afford appellant the full 7-day reply period. Sl. op. 4.

Although *Johnson* may be difficult to reconcile with the Board's later decision in *Ratley,* it does not appear to conflict with the conclusions reached in the present appeals. Whereas in *Johnson* nearly the full 7 days for reply was given (and 1 day in Ratley), here no opportunity at all for answering was granted.

accorded the employees. However, finding that even if the RIF had been properly conducted the employees could have been demoted and would not be better off in any event, the presiding official held the error of the agency to be harmless. Affirming, the Board ruled that the appellants, as non-veteran excepted employees, had no right to appeal their demotions under 5 U.S.C. § 7513 and that they had suffered no harmful error by the failure of the agency to apply the RIF regulations; however, the Board ordered that the appellants be awarded salary retention under 5 U.S.C. §§ 5362-63. The court remanded the appeals to the ICC because it was not convinced that the full rights of the employees under the RIF regulations and the First Amendment had been adequately evaluated.[16] My reading of *Horne* and the Board's decision in *Ratley* leads me to the conclusion that the procedural error involved in the present appeals may not be remedied by application of the harmless error doctrine.

There is a further question involving the applicability of the RIF regulations in *Horne* and in the cases now before the Board. As noted earlier herein, *Horne* involved the hiring of new personnel to displace the incumbents, a change similar to what has been found in the instant proceeding. I have concluded, after reviewing the circumstances in the present appeals, that it was improper to apply RIF procedures. The actions were taken for reasons personal to the appellants, namely, their party affiliation, and therefore were not within the ambit of the RIF regulations.

This result is dictated by the view that a RIF does not occur when employees are dismissed to make way for the appointment of new hires to fill the vacated positions, unless the displacement is necessitated by exercise of reemployment or restoration rights. 5 C.F.R. § 351.201(a).

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[16] The court noted that remand would not be ordered if the record makes it possible to predict what the agency action on remand would be and that remand is proper only when the agency action will involve policymaking or other discretionary acts. *Id.* 158, n.4.

In *Horne* the Board's opinion and order did not include an analysis of the RIF issue, that is, the appropriateness of applying the RIF regulations. In any event, absent a stated rationale for application of the RIF regulations in *Horne* and in view of the fact that the Board would have denied the appellants relief either under 5 U.S.C. § 7513 or under the RIF regulations, it appears that *Horne* need not be applied as a definitive and binding interpretation of the reduction-in-force definition found in the regulations. 5 C.F.R. § 351.201(a).

(b) Rights of non-veteran appellants

Appellants who are not preference eligibles ask the Board to set aside the reduction-in-force action on the grounds that a bona fide reduction in force did not take place and that their separation was based on political reasons in violation of their rights under the First Amendment and 5 U.S.C. § 2302(b)(1). Non-veteran appellants may appeal agency action taken in a true reduction in force. Having found, however, that the purported reduction in force was a removal action personal to the appellants, appellants must show some other jurisdictional basis for the Board to hear the removal appeals of the appellants. These appellants have failed to show any such basis for the Board to accept their appeals.

Excepted employees who are not preference eligibles are excluded from the protections of 5 U.S.C. §§ 7511-13 and have no right to appeal their removal before this Board. Moreover, claims of political discrimination under the First Amendment or 5 U.S.C. § 2302(b) may be entertained by the Board only if they are related to a matter which is independently appealable to the Board. *See Chandler* v. *ICC*, 3 MSPB 173 (1980), in which the Board held that the employee's termination for poor performance during her probationary period was not appealable to the Board even though she alleged her dismissal was due to unlawful sex discrimination.

The Board's jurisdiction does not cover the appeals of the non-veteran appellants and they must therefore be dismissed.

Summary

The appellants' employment with the Department of Agriculture was terminated by reduction in force when their positions were by executive order changed from Schedule A to Schedule C of the excepted civil service.[17] However, because neither the significant duties and responsibilities nor the grade of the positions changed and no "planned elimination, addition, or redistribution of functions or duties" occurred,[18] a "reorganization" or "reclassification" justifying reduction-in-force action did not take place. Moreover, the fact that new personnel were to be appointed as appellants' replacements did not bring the Department's action within the reduction-in-force regulations.

Since the appellants were discharged because they were deemed not suitable for retention in the new confidential, policy-implicated positions in Schedule C, the reasons for their removal must be regarded as personal and, hence, requiring their dismissals to be treated as adverse actions[19] rather than reductions in force. However, only those appellants who are preference eligibles enjoy the

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[17] The validity of the executive order is not in question in these appeals. The President is authorized to place positions in the excepted service. 5 U.S.C. § 3302. Nor is the propriety of the Schedule C designation at issue in view of the conclusions reached herein.

[18] 5 C.F.R. § 351.203(f).

[19] Schedule C includes those positions which have been recognized as permitting wide discretion to select persons who are acceptable to management for a confidential relationship and committed to the particular administration's objectives. *Horne, supra,* at 158. Lack of trust under such criteria may likewise lead to summary dismissal of an incumbent without the procedures applicable to other civil servants.

protections which apply to the removal of most other, career employees. 5 U.S.C. §§ 7511-13.

The failure of the Department to follow the required procedures in removing the appellant-veterans was a denial of due process and not in accordance with law. The reduction-in-force actions must, therefore, be rescinded.

The appeals of those appellants who are not preference eligibles must be dismissed, for their removal from positions in the excepted service is not within the appellate jurisdiction of the Board. Because their appeals are not within the Board's jurisdiction, their claims of denial of rights under the First Amendment and other laws are not reviewable in this proceeding.

Order

It is ORDERED that the separation of those appellants [20] who are preference eligibles be rescinded as violative of 5 U.S.C. § 7513(b) and they be restored retroactively to their positions or to positions of like grade and tenure in the Department of Agriculture.

It is further ORDERED that the appeals of those appellants who were not preference eligibles at the time of their separation [21] be, and they are hereby, DISMISSED.

Notice

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board thirty-five (35) calendar days after issuance of this de-

[20] The question of the timeliness of the appeal of Ralph H. Cochran is resolved in favor of appellant in view of his sworn statement indicating it was mailed May 18, 1981.

[21] From the record before the Board it appears that the following appellants are not preference eligibles:

John F. Apitz
Billy B. Burke
William E. Burnette
Brian D. Burns
Lawrence E. Dahl
Stewart G. Huber
J. Fred King
Myron A. Maiewski

cision unless a petition for review is filed with the Board within thirty-five (35) calendar days after the issuance of this decision or the Board reopens the case on its own motion.

Any party to this appeal may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exceptions taken to this decision, cite the bases for the exceptions, and refer to applicable law, rule or regulations.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Room 806, Washington, D.C. 20419, no later than thirty-five (35) calendar days after issuance of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to establish that:

(a) new and material evidence is available that despite due diligence was not available when the record was closed; or

(b) the decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1), the appellant may petition the United States Court of Appeals for the Federal Circuit to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

Dated: January 12, 1983

/s/ John J. McCarthy

JOHN J. MCCARTHY
Chief Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2444
85-2469
85-2470

MSPB Docket No. ATO3518110533

STEWART G. HUBER, MYRON A. MAIEWSKI, JOHN F. APITZ, BILLY R. BURKE, WILLIAM F. BURNETTE, BRIAN D. BURNS, LARRY E. DAHL, and J. FRED KING,
Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

JUDGMENT

On Appeal from the Merit Systems Protection Board in Case No(s). ATO3518110533

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: *AFFIRMED.*

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Jun 5, 1986

Issued as a Mandate: June 26, 1986

STATUTES AND REGULATIONS INVOLVED

STATUTES

Section 3502(a) of Title 5, United States Code, provides in pertinent part as follows:

§ 3502. Order of retention

(a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—

(1) tenure of employment;

(2) military preference, subject to section 3501(a)(3) of this title;

(3) length of service; and

(4) efficiency or performance ratings.

Section 7512 of Title 5, United States Code, provides as follows:

§ 7512. Actions covered

This Subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduc-

tion is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

Section 7701(a) of Title 5, United States Code, provides in pertinent part as follows:

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

Section 7703 of Title 5, United States Code, provides in pertinent part as follows:

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

* * * *

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

REGULATIONS

The regulations governing reductions in force appear in 5 C.F.R. Part 351. The following excerpts are from the regulations as they were in effect as of the time of Petitioners' separation:

Title 5—Administrative Personnel

§ 351.201 Use of regulations.

(a) Each agency shall follow this part when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

* * * *

§ 351.202 Coverage.

(a) Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

(1) The executive branch of the Federal Government.

(2) Those parts of the Federal Government outside the executive branch which are subject by statute to the competitive service requirements.

(3) The civil service of the government of the District of Columbia.

(b) This part does not apply to an employee:

(1) In a position in or under the legislative or judicial branch of the Federal Government, except an employee in a position subject by statute to the competitive service requirements, or

(2) Whose appointment is required by Congress to be confirmed by, or made with, the advice and consent of the United States Senate, except a postmaster.

§ 351.203 Definitions.

In this part:

(a) "Competing employee" means an employee in tenure group I, II, or III.

* * * *

(g) "Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

Subpart I—Appeals and Corrective Action

§ 351.901 Appeal.

An employee who has been affected by a reduction in force action and who believes this part has not been correctly applied may appeal to the Merit Systems Protection Board under the provisions of the Board's regulations.

(5 U.S.C. 7701, et seq.)

[44 FR 48952, Aug. 21, 1979]

The regulations governing appeals from "adverse actions" appear in 5 C.F.R. § 752, and provide in pertinent part as follows:

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION
Washington, D.C. 20250

25 Mar. 1981

SUBJECT: Specific Notice of Reduction-in-force

TO: Mr. John Apitz

The President's Executive Order dated *March 23, 1981*, (see attachment 1) provides that the State Director positions in the Farmers Home Administration (FmHA) shall be placed in Schedule C. As a result, your position in the Excepted Service under Schedule A, 5 CFR 213.-3313(A)(7), has been abolished. Since you are the sole occupant of your competitive area and competitive level, it becomes necessary to separate you through reduction-in-force from your present position, effective the close of business *May 1, 1981.* Information concerning your status under reduction-in-force follows:

PRESENT POSITION	:	State Director, Minnesota
SERIES & GRADE	:	GS-301-15
LOCATION	:	St. Paul, Minnesota
COMPETITIVE AREA	:	State-wide, Minnesota
COMPETITIVE LEVEL	:	A, State Director, GS-15
RETENTION SUBGROUP	:	I-B
SERVICE COMPUTATION DATE	:	03-17-75

You will be retained in an active duty status through *May 1, 1981.* You will be paid a lump sum for any annual leave remaining to your credit after close of business *May 1, 1981.*

You were selected for this action in the manner prescribed by reduction-in-force regulations administered by the U.S. Office of Personnel Management (OPM, formerly the U.S. Civil Service Commission). You may examine these regulations, which are contained in Supplement 990-1, Book III, Part 351 of the Federal Personnel Manual and the Department Personnel Manual. You may inspect the retention register relating to your case in the Personnel Division, Room 6900-South Agriculture Building, Washington, DC., or it will be mailed to you upon request.

The boxes as checked pertain to you with respect to your entitlement to severance pay:

☒ You are eligible for severance pay upon your separation. If you wish, you may resign prior to the separation date designated above.

An earlier separation date entitles you to receive severance pay sooner and thus possibly avoid a loss of income due to being placed in a nonpay status; on the other hand, a longer period on the Agency rolls may enable you to obtain other Federal employment without a break in service. If you believe an earlier separation date will be to your advantage, please indicate your preference on the form supplied for this purpose and return it to this office. Specific information on the amount of severance pay cannot be furnished until the exact date of your separation is established.

☐ Since you are entitled to an immediate annuity, you are not entitled to severance pay.

☐ You are not entitled to severance pay because

. . . . . .

. . . . . .

. . . . . .

. . . . . .

The following information relates to your eligibility for an immediate annuity under the Civil Service Act:

☒ You do not qualify on the basis of age and service for either optional or discontinued service retirement.

☐ Based on your age and length of service, you are eligible for optional retirement. If you are interested in filing an Application for Retirement, SF-2801, you should contact Mr. Ronald Kerrigan on 202-447-5713 (FTS).

☐ Based on your age and length of service, you are eligible for discontinued service retirement. If you are interested in filing an Application for Retirement, SF-2801, you should contact Mr. Ronald Kerrigan on 202-447-5713 (FTS).

You should consult the local office of the State Employment Service to determine your eligibility for unemployment compensation. You may also wish to file an application with the nearest office of the U.S. Employment Service which will assist you in your efforts to find employment.

You may appeal to the Merit Systems Protection Board (MSPB, formerly part of the U.S. Civil Service Commission) if you consider that this proposed action violates your rights under the procedures governing Reduction-in-Force (RIF) Actions or if you are denied the right to examine records, regulations and/or retention registers and statements of exception. An appeal may be filed with the Merit Systems Protection Board, *Chicago Field Office, 230 South Dearborn St. 31st Floor, Chicago, Illinois 60604*, at any time from date of this notice, but not later than 20 calendar days after the effective date of the action.

However, before appealing, you should examine the regulations, instructions in the Federal Personnel Manual, and

the retention records upon which this notice is based. Copies of the Merit Systems Protection Board's regulations and the appeal form contained in these regulations are enclosed. In making your appeal, you must give specific reasons for the appeal.

Please be assured that we have given full consideration to your qualifications and rights under the regulations. Nothing in this action should be construed as reflecting adversely against your job performance. If there is anything in this notice that you do not understand, or if you have any questions regarding the reduction-in-force, please contact Mr. Timothy J. Ryan on 202-447-7956 (FTS).

/s/ Joseph A. O'Mara
JOSEPH A. O'MARA
Acting Director, Personnel Division

Enclosures

1. FED Facts (Pamphlet 13)
2. Severance Pay
3. 5 CFR 1200
4. Appendix I—MSPB Appeals Form
5. Executive Order

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION
Washington D.C. 20250

Mar. 25, 1981

SUBJECT: Withdrawal of Delegated Authority

TO: Mr. John F. Apitz

This is in reference to the Reduction-in-Force notice dated today informing you that your position as State Director, would be abolished effective May 1, 1981, due to the issuance of the President's Executive Order. This Executive Order establishes a new Schedule C position to direct FmHA operations in the State of Minnesota for the Administration.

Your authority as State Director is withdrawn effective upon receipt of this letter. Until the end of your notice period under Reduction-in-Force regulations, you will be assigned appropriate duties and responsibilities by the person I have designated as Acting State Director.

/s/ Dwight O. Calhoun
DWIGHT O. CALHOUN
Acting Administrator

Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-354 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1986

QUESTION PRESENTED

Whether the rule of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), precludes the Merit Systems Protection Board from refusing to order reinstatement of non-preference-eligible excepted-service employees who are separated in a removal action that is improperly labeled a reduction-in-force by their employing agency.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-354

STEWART G. HUBER, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 793 F.2d 284. The opinion and order of the Merit Systems Protection Board (Pet. App. 10a-20a) is unofficially reported at 28 M.S.P.R. 17. The opinion and order of the administrative law judge (Pet. App. 21a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1986. The petition for a writ of certiorari

was filed on September 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioners are eight former employees of the Department of Agriculture. Prior to May 1981, when they were separated from their jobs, petitioners held appointments either as State Directors of the Farmers Home Administration (FmHA), or as State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). Both of those agencies are components of the Department of Agriculture. Pet. App. 22a.

Petitioners' former positions were "Schedule A excepted service" appointments (Pet. App. 22a). "Excepted service" appointments are those which generally lack the job-tenure rights of competitive civil-service positions. See 5 U.S.C. 7511(a)(1) and 7513. "Schedule A" appointments are excepted service positions "other than those of a confidential or policy-determining character for which it is not practicable to examine" (5 C.F.R. 6.2). Certain "excepted service" employees—*i.e.*, veterans and other "preference eligible" individuals—do enjoy job-tenure rights under 5 U.S.C. 7513, which protects against discharge except for cause. See 5 U.S.C. 7511(a)(1)(B) and 7513(a). Petitioners, however, are not veterans or otherwise "preference eligible" individuals (Pet. App. 46a n.21).

The positions that petitioners formerly held entailed a high degree of executive authority in ad-

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[1] Although the petition states that the "[j]urisdiction of this Court is invoked under 28 U.S.C. § 1254(3)," that appears to be a typographical error.

ministering the government's farm policies. See Pet. App. 27a-28a, 32a. Since the early 1950s, when these positions were removed from the competitive service and placed in Schedule A, "incumbents of th[e]se positions had usually been replaced with each change in administration" (*id.* at 24a n.4). Non-veteran employees like petitioners, who enjoyed no job-tenure protection, had traditionally "been dismissed summarily" (*ibid.*). Veteran and other preference-eligible employees, who did enjoy job-tenure protection, "had usually been reassigned to other positions with the same grade and pay" if they refused to resign upon request (*ibid.*). When petitioners accepted their appointments as state directors, they were advised that "they would not have the tenure rights of competitive service employees" (*ibid.*).

In March 1981, the President issued an Executive Order directing that petitioners' positions be reclassified from Schedule A to Schedule C of the excepted service. Exec. Order No. 12,300, 46 Fed. Reg. 18683 (1981). Schedule C covers positions "of a confidential or policy-determining character" (5 C.F.R. 6.2). It was expected that this reclassification would more clearly reflect the confidential, policymaking nature of the state directorships and make incumbents of those positions—both veteran and non-veteran—subject to summary removal (Pet. App. 25a).

The Department of Agriculture believed that the Executive Order effected a "reorganization [or] reclassification due to change in duties" (5 C.F.R. 351.201(a)) and accordingly applied the reduction-in-force (RIF) rules of the civil service regulations (Pet. App. 26a). On March 25, 1981, petitioners and the other incumbent directors were notified that, as a result of the Executive Order, their Schedule A

positions would be reclassified to Schedule C and, furthermore, that they would be separated from those positions by a reduction-in-force, effective May 1, 1981 (*id.* at 2a, 22a, 25a-26a). Petitioners were further advised of their right to appeal the RIF to the Merit Systems Protection Board pursuant to 5 C.F.R. 351.901, which provides that such appeals may be taken by any employee "who has been affected by a reduction-in-force action and who believes that this part has not been correctly applied." Pet. App. 2a, 22a.

2. Petitioners and 24 other incumbent directors, the latter being veterans, appealed their separations to the Board (Pet. App. 22a). An administrative law judge (ALJ) found merit in their contention that they had not been separated by a valid reduction-in-force (*id.* at 26a-34a). Based on a comparison of the old Schedule A and the new Schedule C position descriptions, the ALJ found it "inescapable that there was no reorganization and no reclassification" within the meaning of the RIF regulations and, hence, that "the RIF action was invalid" (*id.* at 34a (footnote omitted)). The ALJ also found, as petitioners and the other incumbent directors had urged, that "the actions taken against [them] were based on reasons personal to them—essentially, not being 'qualified' for the confidential and policy-related responsibilities involved" (*ibid.*). The ALJ accordingly concluded that the separations had to be "viewed as removals 'for cause,' rather than as reductions in force" (*ibid.*).

On the question of remedy, the ALJ held that the 24 veteran ("preference eligible") employees were entitled to be reinstated and paid back wages, reasoning that they had been separated without receiving

the procedural protections to which the Civil Service Reform Act, 5 U.S.C. 7511-7513, entitled them (Pet. App. 39a-44a). The ALJ refused, however, to grant similar relief to petitioners, concluding that "their appeals are not within the Board's jurisdiction" (*id.* at 46a). Although "[n]on-veteran appellants may appeal agency action taken in a true reduction in force" (*id.* at 44a; see 5 C.F.R. 351.202 and 351.901), the ALJ pointed out that the purported reduction-in-force involved here was in reality "a removal action personal to [petitioners]" (Pet. App. 44a). And since petitioners, as non-preference-eligible employees in the excepted service, were excluded from the job-tenure protections of 5 U.S.C. 7513, and hence could be removed without cause, the ALJ concluded that they "have no right to appeal their removal before this Board" and that their appeals "must therefore be dismissed" (Pet. App. 44a, 46a).

3. On cross-petitions for review, the Board upheld the ALJ's disposition of the various appeals (Pet. App. 10a-20a). The Board agreed that all appellants had been subjected to a removal action rather than to a RIF, that the preference-eligible employees had not received the statutory process due them prior to their separations, and hence that the 24 veterans were entitled to reinstatement and back pay (*id.* at 12a-18a). The Board also agreed that petitioners' appeals "were properly dismissed" (*id.* at 19a), although its reasoning differed somewhat from the ALJ's. Petitioners pointed out that the Board technically had "jurisdiction" of their appeals "because they were removed as a result of the application of RIF regulations, [which] provide a right of appeal to the Board" (*id.* at 18a). The essence of petitioners' argument was that the Board, in declaring a remedy,

could not go behind the reduction-in-force rationale invoked by the agency for dismissing them, so that, upon finding the RIF invalid, the Board assertedly had no alternative but to order the RIF reversed and petitioners reinstated. See Pet. App. 18a-19a.

The Board squarely rejected the latter argument. It agreed that a reviewing body generally " 'must judge the propriety of * * * [agency] action solely by the grounds invoked by the agency' " (Pet. App. 18a, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*)). But the Board nevertheless concluded that it had authority independently to determine whether an employee's separation was attributable to a RIF or constituted a removal action, and, upon finding the latter, to "examine[] the appellants' 'tenure rights' before determining what disposition was proper" (Pet. App. 18a-19a). Since petitioners, as "non-preference eligibles," had no job-tenure rights which the Board could enforce (*id.* at 19a), the Board held that the ALJ had correctly declined either to order petitioners reinstated or to remand to the agency for reimplementation of the separation decisions. *Id.* at 18a-19a, citing *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982).

4. The court of appeals unanimously affirmed (Pet. App. 1a-9a). While the court acknowledged that a reviewing body ordinarily may not " 'affirm [an] administrative action by substituting what it considers to be a more adequate or proper basis' " (*id.* at 6a (quoting *Chenery II*, 332 U.S. at 196)), it found that Congress has " 'empowered [the Board] to determine when abuses or violations of law have occurred' " and that this power includes the authority "to review the form of agency actions to determine whether they [are] * * * RIF actions" (Pet.

App. 7a, quoting S. Rep. 95-969, 95th Cong., 2d Sess. 24 (1978)). Indeed, the court noted that recharacterization of the separations as adverse dismissals rather than as RIF actions "was the result urged by all the appellants before the Board" (Pet. App. 6a). The court concluded that *Chenery II* did not require the Board "to accept the agency's denomination of its action as a RIF for jurisdictional and relief purposes, even if this denomination is found by the Board to be erroneous" (*id.* at 7a). The court emphasized that "the agency could have separated the petitioners without cause" at any time (*id.* at 9a) and hence that "[t]here were no additional procedural safeguards or steps to which the petitioners could aspire before the agency" (*ibid.*). The court accordingly held that "the Board did not abuse its discretion in declining to remand the matter to the agency to reimplement [petitioners'] separation" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Further review is not warranted.

1. Petitioners' main contention (Pet. 6-10) is that the decision below violates the principle enunciated by this Court in *Chenery II*. The Court there reaffirmed a "simple but fundamental rule of administrative law"—that the validity of agency action ordinarily must be judged "solely by the grounds invoked by the agency" (332 U.S. at 196). In so stating, the Court referred back to its earlier decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (*Chenery I*), where it had explained that a review-

ing body may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency," and ordinarily must remand to an agency for any "determination of policy or judgment which the agency alone is authorized to make and which it has not made" (*ibid.*). Importantly, however, the Court in *Chenery II* did not express any disagreement with the corollary administrative law principle that it had recognized in *Chenery I*, namely, that a reviewing body may "reinstate a decision which * * * ha[s] already [been] made but which [the reviewing body] conclude[s] should properly be based on another ground within the power of the [reviewing body] to formulate" (318 U.S. at 88). This corollary principle, the Court explained in *Chenery I*, allows reviewing bodies to avoid "wasteful" expenditures of administrative resources by needless remands (*ibid.*).

The decision in this case follows straightforwardly from the corollary administrative law principle stated in *Chenery I*. The court below found that Congress has empowered the Board, for jurisdictional and remedial purposes, to "review the form of agency actions to determine whether they were proper RIF actions" (Pet. App. 7a). On that basis, the court of appeals held that the Board had properly recharacterized the Department's RIF as a removal action for purposes of determining its authority to provide relief (*id.* at 7a-8a). The court then concluded that the Board had properly refused to provide petitioners the same relief (reinstatement and back pay) that it had granted the 24 veterans, since "[p]etitioners, as excepted service employees without preference eligibility, could have been removed at any time, with or

without cause" (*id.* at 8a). And the court further concluded that the Board had not abused "its discretion in declining to remand the matter to the agency to reimplement [petitioners'] separation[s]," since "[t]here were no additional procedural safeguards or steps to which the petitioners could aspire before the agency" (*id.* at 9a). On these facts, the court correctly concluded that the Board had correctly declined to order the relief requested by petitioners and that a remand to the Department of Agriculture would only have produced the wasteful expenditure of agency resources that the Court in *Chenery I* had admonished reviewing bodies to avoid. *Ibid.* (citing *Chenery I*, 318 U.S. at 88).

Petitioners seek to undermine this straightforward application of the corollary administrative law principle recognized in *Chenery I* by suggesting (Pet. 5-10) that the court below held the *Chenery II* principle—*i.e.*, the rule that a reviewing body should not affirm agency action on the basis of reasons the agency has not articulated—to be applicable only to courts, and not to administrative tribunals. Petitioners misread the decision below. The court of appeals expressly acknowledged that the *Chenery II* rule is binding on all reviewing bodies, administrative and judicial. See Pet. App. 6a-7a, 9a. The court merely held that *Chenery II* did not require the Board to accept the agency's denomination of its action as a RIF for relief purposes, where petitioners urged, and the Board found, that that denomination was erroneous (Pet. App. 7a). Congress authorized the Board to make that determination, and the Board, having determined that petitioners were removed, rather than subjected to a RIF, correctly held that they had no additional rights which the Board could require

the agency to provide. See *id.* at 9a (citing *Chenery I*, 318 U.S. at 88).[2]

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[2] Petitioners' subsidiary argument (Pet. 6-7) that the decision below conflicts with this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and with the District of Columbia Circuit's decision in *Horne* v. *MSPB*, 684 F.2d 155 (1982), is also in error. Those cases do not suggest, much less hold, that the *Chenery II* rule precludes an administrative tribunal like the Board from affirming an employing agency's action on the basis of an independent statutory power granted by Congress.

In *Vitarelli*, the Secretary of Interior discharged a non-preference-eligible employee for "national security" reasons. The court of appeals affirmed that discharge, notwithstanding the Secretary's failure to follow the procedural standards applicable to "national security" removals, because the Secretary could have summarily discharged the employee without providing him any explanation whatsoever. 253 F.2d 338, 342 (D.C. Cir. 1958). This Court reversed, holding that, when an agency's regulations provide that it must follow certain procedures before terminating an employee for a specific reason, a reviewing body may not relieve the agency of its obligation to follow those procedures just because the agency could have terminated the employee for some other reason. 359 U.S. at 539-540; see also *id.* at 546 & n.9. Here, of course, the Board has not relieved the Department of any procedural obligations, since the Department fully provided petitioners with the procedural protection set forth in the RIF regulations (*e.g.*, the 30-day notice period), and since the Department is not required to provide petitioners, who were at-will employees, with any other procedural protections against removal. In any event, the court below found that Congress has granted the Board independent authority to ignore the form and to determine the substance of an agency's employment action; in *Vitarelli*, there was no suggestion that Congress had provided the federal courts with any similar independent authority.

In *Horne*, the ICC demoted and reassigned two career attorneys without following formal RIF procedures. The Board found that the agency had implemented a *de facto* RIF, but refused to remand to the agency for disposition by

2. Petitioners next contend (Pet. 10-13) that the decision below allows the Board to depart from its prior practice of taking "jurisdiction" of appeals of this sort. Petitioners assert that the Federal Circuit's ruling is a "Catch-22 holding" (Pet. 15) that "will deprive hundreds of thousands of federal employees who are not protected by the veterans' preference laws of the right to appeal from abuses of the reduction-in-force authority" (Pet. 10). These assertions are quite mistaken.

As noted above, OPM regulations allow both "preference-eligible" and "non-preference-eligible" employees affected by a RIF to appeal to the Board if they believe that RIF procedures have not been correctly applied. See 5 C.F.R. 351.901. The Board in the instant case took "jurisdiction" of petitioners' appeal in the sense that it adjudicated the merits of their claim that their separations were not attributable to a valid RIF but rather were removal actions. As both the court below (Pet. App. at 7a) and petitioners themselves (Pet. 12 & n.10) have noted, however, the Board has previously reviewed the form of an agency's separation decision to determine whether a RIF or a removal action has actually occurred. In this re-

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formal RIF procedures because "the ICC's failure to conduct a formal RIF had not injured" the employees (684 F.2d at 157). The court of appeals reversed. It agreed that the Board could recharacterize the ICC's action, but held that a remand for disposition by formal RIF procedures was required. See *id.* at 157-158. The court noted, however, that "[a] remand would be unnecessary if [the employees] had [had] no job tenure rights" (*id.* at 158). Thus, *Horne* directly supports the Board's approach in this case, where, after recharacterizing a nominal RIF as a removal action, the Board declined to remand because petitioners had no job-tenure rights.

gard, therefore, the Board's decision does not depart in any way from its prior practice.

The ALJ, the Board and the court of appeals declined, however, to award petitioners the relief that they requested—reinstatement and back pay—because petitioners, unlike the 24 preference-eligible veterans, were at-will employees who had "no rights under 5 U.S.C. 7511-7513 which the Board [could] enforce" (Pet. App. 19a), and, in reaching this conclusion, the ALJ may have used the term "jurisdiction" in a somewhat ambiguous fashion. His action could be described as a decision that petitioners' claims in essence were adverse removal claims and that the Board lacked jurisdiction of such claims made by persons (like petitioners) who are not preference-eligible. Alternatively, the ALJ's action could be described as a decision that petitioners had failed to state a claim on which relief could be granted, since petitioners had received all protection provided by the RIF regulations and had no job-tenure rights, making the agency's erroneous characterization of their separations as a RIF a *damnum absque injuria.* This ambiguity is what causes petitioners to accuse the Board of departing from its prior practice.

In our view, it makes little difference which way the ALJ's action is characterized. The bottom line reached by the ALJ, the Board, and the court of appeals is that petitioners were entitled to no relief. That bottom line is clearly correct. Since the early 1950s, non-veteran incumbents of petitioners' positions had either resigned or been dismissed upon changes in administration (Pet. App. 24a n.4). Like their predecessors, petitioners could have been removed by the Department of Agriculture, with or without cause, at any time. Petitioners had no job-retention rights under the statute, and they gained

no greater job-retention rights by virtue of the agency's having mischaracterized their separation as a RIF. Since they also erroneously received the benefit of the RIF regulations (e.g., the 30-day notice period), they simply had no claim to any additional relief of any type.

3. Petitioners say that the decision below produces "irrational" and "arbitrary" distinctions between veteran and non-veteran employees (Pet. 10, 13-15). But the Board's decision simply implements the RIF regulations and the adverse-removal provisions of the statute, which themselves vary the coverage provided to preference-eligible and non-preference-eligible individuals in the excepted service. The RIF regulations deal with actions directed solely at a position within an agency and, under the regulatory scheme, cover all excepted-service employees—veteran and non-veteran—who occupy that position. See *Grier* v. *Department of Health and Human Services*, 750 F.2d 944, 945 (Fed. Cir. 1984); see also 5 C.F.R. 351.201 (a), 351.202 and 351.901. In contrast, the adverse-removal provisions of the statute deal with actions directed at particular employees and, under the statutory scheme, cover only veteran and other preference-eligible persons in the excepted service. See *Fiorentino* v. *United States*, 607 F.2d 963, 966 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083 (1980); see also 5 U.S.C. 7511(a)(1)(B). The hypothetical cases that petitioners describe and criticize (Pet. 13-14) reflect the fact that non-preference-eligible employees in the excepted service are covered by the RIF regulations but not by the removal provisions. Thus, when petitioners complain that the Board's decision will produce "irrational" and "arbitrary" results, what they really mean is that, in cases where an agency has mistakenly labeled a removal a RIF, the Board's approach—which treats all substantive RIF actions as RIF ac-

tions and all substantive removal actions as removal actions—will foreclose them from receiving procedural protections against adverse removal that, by statute, they are not entitled to receive anyway.[3] Unfortunately for petitioners, it is not for the Board or this Court to alter that legislative choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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[3] As we have explained in more detail in our pending petition for a writ of certiorari in *United States* v. *Fausto*, No. 86-595, Congress clearly barred non-veterans in the excepted service from obtaining review by the Board of adverse personnel actions not involving reductions-in-force. The Federal Circuit so held in *Fausto* (see 86-595 Pet. App. 27a), and that question is not at issue in that case. Rather, the issue in *Fausto* is the different question whether a non-veteran excepted-service employee may obtain review of an adverse personnel action in the Claims Court pursuant to the Tucker Act, 28 U.S.C. 1491, even though it is clear that Congress barred him from obtaining review by the Board.

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No. 86-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, MYRON A. MAIEWSKI,
JOHN F. APITZ, BILLY R. BURKE,
WILLIAM F. BURNETTE, BRIAN D. BURNS,
LARRY E. DAHL, and J. FRED KING,
Petitioners,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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STEWART G. HUBER, MYRON A. MAIEWSKI, JOHN F. APITZ, BILLY R. BURKE, WILLIAM F. BURNETTE, BRIAN D. BURNS, LARRY E. DAHL, and J. FRED KING,
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REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

The Brief in Opposition neither defends, nor denies the importance of, the principal holding of the Federal Circuit, that the *Chenery* rule provides "no . . . restraint" on an independent adjudicatory Board's treating an administrative action as if it had been taken on a legal authority which the agency never invoked (Pet. App. 7a); and that Petitioners in arguing for such a restraint "confuse the assigned roles of the Board, itself part of the administrative agency structure, and the courts" (*id.*, 6a). Instead, Respondent attributes to that Court a "bottom line" approach which denies relief to employees wrongly separated under one personnel authority if they

were untenured and hence could have been separated without appeal rights under a different authority. But this argument—and Respondent's corollary suggestion that it is supported by the first *Chenery* decision—not only reads the decision below inaccurately, but raises even broader questions of administrative and personnel law. In fact, Petitioners submit that Respondent's "defense" is, effectively, an attack on the holding and reasoning of this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Its arguments therefore only raise the significance of the case and the need for review.

The Government itself is currently seeking review of a Federal Circuit decision recognizing the right of this very class of employees to question the legality of adverse actions in Tucker Act suits. *United States* v. *Fausto*, O.T. 1986, No. 86-595. It is poorly situated to contend that the present ruling—which it does not deny would preclude the same large class from contesting misuse of the reduction-in-force authority—does not also warrant review. Petitioners submit that, as this case presents issues affecting the integrity of the *Chenery* rule and the independence of the Merit Systems Protection Board, it is a stronger one for review than *Fausto*.

1. Respondent's plea (*e.g.*, br. in opp. 12) that the "bottom line is clearly correct" because, allegedly, the Department of Agriculture *could* have separated Petitioners readily in an adverse action, is precisely the contention rejected by this Court in *Vitarelli* v. *Seaton*, *supra*. *Vitarelli* refutes in this exact context Respondent's contention that the first *Chenery* decision allows the reviewing forum to deny relief for violations on the "bottom line" theory that the agency could have taken an unassailable action. The four concurring justices, in an opinion by the author of *Chenery I*, indeed cited that decision for just the opposite proposition, 359 U.S. at 546-47. While Respondent views the result below as avoiding "'wasteful' expenditures of administrative resources"

(br. in opp. 8), this Court in *Vitarelli* held that *relief* must be granted those separated under an authority which did not support the action. Holding an agency to legal authority it invoked has never before been held expendable as a "waste;" instead it preserves integrity in administrative agencies.[1] In the cases we have cited (Pet. 11-12) in which an employee prevailed on the ground that a supposed RIF was aimed at him personally, the Board's opinion concluded with a standard order for reinstatement and back pay.

2. In seeking to explain each action and decision involved on bases other than that on which it was taken, Respondent only compounds the violation of the *Chenery* rule, by engaging in classic *post hoc* rationalization. The *Chenery* violation is not explained away by the euphemistic characterization of the flaw in the Department of Agriculture's action as being merely that it "mistakenly labeled a removal a RIF" (br. in opp. 13, also

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[1] Often when an agency which has taken an errant circuitous path complains that there should be no consequences because it could have acted directly, the latter proposition is not so clear. Although whether or not that was true here seems irrelevant to the issues now before the Court, in view of Respondent's reliance on the proposition, it may be helpful to put some perspective on the matter. The Department of Agriculture chose the reduction-in-force route in circumstances indicating that any overt adverse action would be subject to serious challenge: (a) a District Court had ruled only months before, that dismissals from one of these positions for partisan political reasons violated this Court's decision in *Branti* v. *Finkel*, 445 U.S. 507 (1980), *see Delong* v. *United States*, Civil No. 78-294-A (E.D. Va.) (per Bryan, J.), decided Sept. 18, 1980, vacated as moot in accordance with settlement agreement, No. 80-1713, 4th Cir., Nov. 24, 1981 (holding, after trial, that the essential functions of the position were that of managing credit and no necessity was shown for politicizing it, despite a considerable practice of doing so); (b) a long-standing Court of Claims decision held that political affiliation was not "cause" for dismissing veterans from the position, *Schmidt* v. *United States*, 145 Ct.Cl. 632, 636 (1959), later opinion, 153 Ct.Cl. 407 (1961); and (c) the agency needed to act with respect to both veterans and non-veterans.

"Question Presented").[2] According to this unprecedented theory of Respondent, any administrative choice as to what action to take may be deemed merely a "label" which the reviewing forum may revise in order to sustain the action under a different guise. Respondent's theory should only heighten the conclusion that the Federal Circuit's ruling represents such an easy route around the *Chenery* rule as to seriously weaken it.

In the particular personnel law context indeed one cannot accidentally mislabel an adverse action a RIF; there is always a deliberate choice because, as Respondent admits (br. in opp. 13), the *motivation* of the two actions is different: one, as its name implies, must be based solely on managerial reasons, such as a lack of funds requiring a "reduction-in-force;" the other is directed to the qualifications of the individual. Respondent's argument applies equally to all cases in which the reduction-in-force authority is misused. If the ruling below stands, then every RIF taken for reasons personal to employees constitutes a "mislabeling" which the Board may "correct" by purporting to find that it actually is an adverse action. In this way, the right of hundreds of thousands of excepted service non-veteran employees to appeal from RIFs—recognized in many prior Board cases (see Pet. 10-13)—would disappear through a semantic device.

3. Respondent misreads the Petition in stating (br. in opp. 13) that we assert that the ruling below produces irrational distinctions "between veteran and non-veteran employees." Instead, the examples of irrationality (Pet. 13-14) are ones of anomalous distinctions between em-

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[2] The Federal Circuit's similar euphemism was that the Board merely corrected a mistake in the agency's having "initially designated" the action as a RIF (Pet. App. 7a). Nothing in the announcement of a RIF is amenable to such a characterization, either in this case (Pet. App. 54a-57a), or in any other. The only reason that the designation proved to be "initial" here was that the Board wrongly switched to another.

ployees, all of whom are non-veterans. Respondent has offered this Court no explanation how the ruling below coud work sensibly in practice.[3]

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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[3] As Respondent notes (br. in opp. 2 n.1), by inadvertence, we cited 28 U.S.C. § 1254(3) as the jurisdictional basis for the Petition. The intended and correct basis is 28 U.S.C. § 1254(1).

Supreme Court, U.S.
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No. 86-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, MYRON A. MAIEWSKI, JOHN F. APITZ, BILLY R. BURKE, WILLIAM F. BURNETTE, BRIAN D. BURNS, LARRY E. DAHL, and J. FRED KING,
Petitioners,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

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13 pp

QUESTION PRESENTED

Whether the court below erroneously, and in conflict with precedent of this Court, held that the Merit Systems Protection Board may review the dismissal of federal employees as if the action was taken on a different basis than that relied upon by their employing agency?

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is the third largest federal sector labor organization. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. Section 7701 *et seq.*, NTEU is the exclusive bargaining representative of approximately 110,000 federal employees throughout the nation, including individuals like the petitioners who are in "Excepted Service" positions. NTEU represents the employment interests of

the members of its bargaining units, *inter alia*, by negotiating collective bargaining agreements with federal agency employers, by arbitrating grievances under such agreements, and by providing employees with representation before the Merit Systems Protection Board ("Board"). Thus, the interests of NTEU, and the federal employees it represents, will be affected by any decision in this case, which involves the standards under which agency personnel actions are reviewed, and the proper role of the Board in such disputes.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-9a) and its Judgment (Pet. App. 48a) were entered on June 5, 1986. The Opinion is reported at 793 F.2d 284.

The Opinion and Order of the Merit Systems Protection Board which the Court of Appeals affirmed was entered on January 31, 1985 (Pet. App. 10a-20a). It is unofficially reported at 28 M.S.P.R. 17, *sub nom. Blalock, et al.* v. *Department of Agriculture.* The Initial Decision of the Chief Administrative Law Judge of the Board was entered on January 12, 1983 (Pet. App. 21a-47a). It is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Federal Circuit were entered on June 5, 1986.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(3).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title 5, United States Code, and of 5 Code of Federal Regulations, are set forth in the Petitioners' Appendix, at pp. 49a-53a.

STATEMENT OF THE CASE

Petitioners, who are not veterans, and other persons who are veterans, appealed to the Board from their 1981 separation from employment with the Department of Agriculture in a reduction-in-force ("RIF") action. After a hearing, an Administrative Law Judge found that the Department of Agriculture had failed to carry its burden of demonstrating that a valid reduction-in-force had occurred. He determined that petitioners' positions, and supposedly new positions which the Department of Agriculture claimed had supplanted them, in fact were substantially the same. He further held that the separations had been motivated by reasons personal to the employees, namely, their political affiliation (Pet. App. 33a-34a, 43a).

The employees who were veterans were awarded reinstatement with backpay. Petitioners, however, were denied relief, and their appeals were dismissed for lack of jurisdiction. The basis for this ruling was that the action which was purportedly a RIF was in reality a disguised adverse action. The Administrative Law Judge opined that since petitioners, as Excepted Service employees, could appeal from a reduction-in-force but not an adverse action, the Board had no jurisdiction over their appeal once it was found that actually the separations were in the latter category (Pet. App. 44a).

After this ruling was accepted by the Board (Pet. App. 10a-20a), petitioners sought review in the United States Court of Appeals for the Federal Circuit. That court affirmed (Pet. App. 1a-9a). In response to petitioners' objection that the Board's reliance not on the personnel authority invoked by the Department of Agriculture, but on an entirely different authority violated the rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), the court held the *Chenery* rule inapplicable to the Board, asserting that "petitioners confuse the assigned roles of the Board, itself part of the

administrative agency structure, and the courts" (Pet. App. 6a). The court contended that the Board's powers to correct agency abuses or violations of law authorized it to "correct" the agency's misuse of the reduction-in-force authority by treating its action as having been taken under a different personnel authority (Pet. App. 7a).

REASONS FOR GRANTING THE WRIT

NTEU submits this *Amicus Curiae* Brief in support of the petition to underline the importance of the issues presented to the federal personnel law. NTEU agrees with petitioners' position on the merits of these issues, which we need not repeat at length.

THE RULING BELOW IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW AND PERSONNEL LAW, AS WELL AS PRECEDENT IN THIS COURT.

1. The rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), is a bedrock one governing review of agency actions including personnel actions. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). In *Vitarelli*, this Court reversed lower court decisions affirming an agency's dismissal of a Schedule A Excepted Service employee for national security reasons. The Court recognized that generally Excepted Service employees can be dismissed without any statement of reasons or procedural protections. Nonetheless, it held that because the agency had invoked national security as the basis for its action, it was bound to comply with procedural regulations which the agency had promulgated concerning such cases "even though without such regulations [the agency] could have discharged [the employee] summarily." *Id.* at 539-540. Furthermore, the Court held that the agency's subsequent summary discharge of the employee did not cure its improper discharge for national security reasons. Accordingly, the Court ordered that the employee be reinstated with back pay, "subject of course to any lawful exercise

of [the agency's] authority hereafter to dismiss him from employment [with the agency]." *Id.* at 546.

Thus, in a case concerning the same class of employees as petitioners, this Court held that the removal of such employees may be sustained only on the grounds stated by the agency as the basis for its action, even if such employees are otherwise subject to summary dismissal. While the dissenting members of the Court disagreed with the majority as to the amount of the employee's entitlement to back pay in *Vitarelli*, they unambiguously agreed that the agency's action could not be sustained on grounds other than those offered by the agency (*Id.* at 546-7, citing *Chenery*). Thus, under the rule in *Vitarelli*, upon finding that the removal of petitioners could not be sustained as a RIF, the Board should have ordered that petitioners be reinstated with full backpay. Furthermore, in the instant case, unlike *Vitarelli*, the employing agency never even attempted to take proper action against the petitioners; rather, it was the Board which provided a rationale for the agency's action. Thus, this case presents even a more blatant violation of the *Chenery* rule, than did *Vitarelli*. Because the Federal Circuit's affirmation of the Board's decision is plainly at odds with this Court's decision in *Vitarelli*, the petition for a writ of *certiorari* should be granted.

2. The Federal Circuit held that the *Chenery* rule was inapplicable in the instant case because here the court was reviewing the final administrative decision of the Board, not the employing agency. It concluded that because the Board itself is part of the administrative structure in personnel actions, the Board is free to uphold personnel actions on grounds other than those relied upon by the employing agency. Pet. App. 6a. However, the court below has misconstrued the nature of the review performed by the Board under the Civil Service Reform Act. As the Court of Appeals for the D.C. Circuit has observed:

> In fashioning that watershed statute, Congress clearly intended that MSPB would carry out a detached quasi-judicial function. It was for this very reason that Congress provided for Presidential appointment of the three Board members, with the advice and consent of the Senate.

Barnhart v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985).

That Congress intended the Board to perform adjudicatory review of agency personnel actions is also demonstrated by the legislative history of the CSRA. In sending his proposed legislation to Congress, President Carter stated that establishment of the Board as an independent adjudicatory body was designed "to correct the inherent conflict of interest within the Civil Service Commission by abolishing the Commission and replacing it with a Merit Protection Board and Office of Personnel Management." H.R. Rep. No. 95-1403, *Civil Service Reform Act of 1978*, 95th Cong. 2d Cong. 2d Sess. (1978), p. 99. The intended function of the Board was described as follows:

> The Merit Protection Board will be the adjudicatory arm of the new personnel systems. It will be headed by a bipartisan board of three members, appointed for 7 years, serving non-renewable overlapping terms, and removable only for cause. This structure will guarantee independent and impartial protection to employees.

Id. at 100

This view of the function of the Board was carried forward in all versions of the bill. For example, Representative Udall, the floor manager of the bill in the House, stated:

> The adjudicatory judicial function of protecting the merit system which we have will be lodged in the Merit Systems Protection Board. The personnel management function will be headed up by the director of the OPM.

124 Cong. Rec. (Daily Ed.) H. 9381 (Sept. 11, 1978). Another sponsor of the bill, Senator Sasser, commented that "[n]early every witness who testified before the Committee on Governmental Affairs supported the concept of splitting the Civil Service Commission into an Office of Personnel Management and a Merit Systems Protection Board." He referred to the "need to establish the adjudicatory and the personnel management functions in two separate bodies . . . ." 124 Cong. Rec. (Daily Ed.) S. 14279 (Aug. 24, 1978).

Faithful adherence to the *Chenery* rule is a hallmark of an independent, impartial adjudicator. The Federal Circuit's reasoning that the Board need not obey the rule because it is "itself part of the administrative agency structure" (Pet. App. 6a), casts the Board in the role of personnel manager, rather than judge. It misconceives the role of this important Board, and is clearly inconsistent with the intent of Congress to establish the Board as an impartial adjudicatory body. The Federal Circuit's decision will adversely affect the many thousands of Excepted Service employees whose rights to Board review of dismissals in reductions-in-force will be rendered meaningless because the Board could simply characterize the dismissals as adverse actions. Accordingly the decision of the Federal Circuit should not be allowed to stand unreviewed.*

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* Furthermore, the Federal Circuit has completely ignored the impact of its decision on employees' choices of forum between the Board and arbitration under collective bargaining agreements such as those to which NTEU is a party. This Court held, in *Cornelius* v. *Nutt*, 472 U.S. ——, 105 S.Ct. 2882 (1985), that generally such arbitrators are to apply the same standards as the Merit Systems Protection Board. Yet the Federal Circuit has now ruled that because the Board is an administrative agency in the Executive Branch, it may disregard the *Chenery* rule and revise actions taken by the Executive Branch agencies. Such a role could not possibly be appropriate for arbitrators, impartial private individuals who by definition cannot function as policymakers or managers in the

CONCLUSION

For the reasons stated above, and in the Petition, the National Treasury Employees Union, as *Amicus Curiae*, urges this Court to issue the writ of *certiorari* in this case.

Respectfully submitted,

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Executive Branch. If the Federal Circuit's decision in the instant case stands, either the Board and arbitrators must function differently in like cases—in apparent contravention of *Cornelius*—or arbitrators must take on an unaccustomed and inappropriate role.